Justice Committee

Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service

Supplementary written submission from the Crown Office and Procurator Fiscal Service

COPFS submitted written evidence in respect of this inquiry on 19 October 2016. Following consideration of the other information provided to the Committee, I thought it may assist to provide some supplementary evidence on behalf of COPFS ahead of my appearance with the Lord Advocate on 17 January.

General

The Committee has heard from many parties who pay tribute to COPFS staff for their dedication, professionalism and work ethic; these are attributes which I see in our staff every day and I am pleased that they have been confirmed so strongly by witnesses before the Committee. The work of skilled prosecutors and dedicated staff who prepare cases for court and work with victims and witnesses is essential to the effective operation of the criminal justice system in Scotland. Serving the public in this way is, by its nature, demanding, and sometimes challenging. The court process is adversarial by design. Against that background, we are pleased to have had the opportunity in this inquiry to highlight the dedicated work of COPFS staff, the challenges which they face and the valuable service which they provide to the people of Scotland.

The criminal justice system is complex. It requires multiple parties to perform their various roles in a way which supports the overall aim of the system – which is to provide justice for all those involved in every case. It also needs members of the public whose participation is required, sometimes in connection with events in their life which were traumatic and sometimes when they would prefer not to be involved at all. I recognise, therefore, that the success of our work as a prosecution service depends greatly on providing a service which minimises or removes difficulties for victims and witnesses, in so far as we are able to, and which promotes the overall effectiveness of the system as a whole.

One of the factors which contributes to these challenges is the extent to which prosecutors work in a court system that requires all cases in which a plea of not guilty is tendered to be prepared as if they are going to trial, even though the vast majority of contested cases will resolve in due course without the requirement for a trial. This affects the victims and witnesses in all such cases, and the prosecution service which must prepare the cases for trial. Devoting preparation time to cases which are not ultimately contested prevents COPFS and others focusing greater resource on preparing those cases which are likely to be contested. It also causes significant inconvenience to the victims and witnesses who make arrangements to go to court to give evidence only to be told, sometimes at the last moment, that their evidence will not be required.
When the process is looked at as a whole, there is still significant scope to improve the way in which the criminal justice system operates. There is significant scope for redesigning the system, so that resources are focused on resolving cases at the earliest opportunity and inconvenience to victims, witnesses and accused persons minimised. This is a task for all those involved in the work of the criminal courts. It is a challenging task but one which offers the opportunity to secure transformational improvement through the work of the Justice Board, and in particular the Evidence and Procedure Review led by SCTS which is fully supported by COPFS.

Staffing

The Committee has been given information relating to the welfare of our staff and different aspects of their working lives, including morale, sickness absence and terms of employment.

Morale

On the basis of our most recent staff feedback in 2016, whilst there remains some way to go to raise the overall engagement of COPFS staff to the same level as the wider Civil Service, there is evidence of improvement which reflects the significant efforts which have been made over the last two years to consult colleagues during a period of organisational change.

92% of those surveyed reported that they are interested in their work. 88% reported that they have a clear understanding of COPFS’s purpose. 81% reported that their manager is considerate of life outside work. 81% reported being treated with respect by the people with whom they work. The proportion which reports that they have an acceptable workload, at 56%, is 15% higher than last year, and just 2% below the Civil Service average, and the proportion stating that they achieve a good balance between work and private life, at 67%, is 11% higher than last year, and reflects the Civil Service average. 60% of staff reported that they wanted to stay with the COPFS for at least the next three years, which is up 6% and is 17% above the Civil Service average.

One of the most important steps which we are taking to improve the wellbeing of our staff follows feedback from staff during our structural change programme, “Shaping the Future”. Building on their feedback about how aspects of their working lives could be improved, we are now developing in consultation with staff and trade unions a “Fair Futures” programme which will implement changes later this year. The vision for “Fair Futures” is that we should continue to develop as a high-performing and aspirational organisation in which our people feel valued, supported and lead fulfilling working lives.

The initial focus of the programme will be on those issues which staff have identified as critical to their improved wellbeing. These are: to consider options for the wider use of free health screening for staff and associated health initiatives; to make more effective use of our occupational health service and Employee Assistance Programme; strengthened management skills to deal more effectively with performance and attendance management and the resolution of grievances and
discipline investigations; and increased use of digital technology to promote flexible working and reduce the requirement for travel on a regular basis.

In order to drive this programme, raise the profile of the issues, and ensure delivery of reduced sickness levels we have put in place a corporate Health and Safety Wellbeing Committee, reporting directly to the Executive Board and supported by a network of regional groups. The Trade Unions are represented on these groups.

Staff Numbers

As of 31 October 2016 COPFS had 1,601 members of staff. This figure is a modest increase on the staffing complement as at 31 March 2012 of 1,537. As of 31 October 2016 there were 534 prosecutors. The number of prosecutors has steadily increased since 2011/12.

There has been a reduction in senior staff and an increase in deputes and senior deputes, the first operational grades for prosecutors, in recent years. As of 31 October 2009 there were 39 senior civil servants. As of 31 October 2016 this number had decreased to 23. In the same period, the number of deputes and senior deputes, our entry grade and first promoted grade for prosecutors, has increased from 285 in 2009 to 354 in 2016.

The following graph demonstrates the interaction between our budget and staffing levels since 2005. In broad terms, it illustrates the point that staffing numbers have been prioritised by savings which have been elsewhere at a time of reducing and flat-cash budgets.
**Fixed Term Contracts**

The Committee has heard concerns about the employment of staff on fixed-term contracts. While there will always be appropriate reasons to employ a certain number of staff on a fixed-term basis, I have taken steps since my appointment in April 2016 to start to reduce the proportion of our staff employed on such contracts, and am pleased to advise that we have made good progress in reducing the numbers of prosecutors on fixed-term contracts and we expect to make further significant progress to increase both permanent promotion and permanent contracts early in 2017.

Only 21 prosecutors are currently employed on fixed-term contracts, compared to 31 in March 2016 and 39 in March 2015. As of 31 October 2016 there were 1067 non-legal members of staff. 163 of these are employed on fixed-term contracts. Of the full staffing complement of 1,601, 110 are currently on temporary promotion.

**Trainee Solicitors**

The Committee has also heard concerns about the recruitment of COPFS trainee solicitors and the work which they undertake as part of their training.

COPFS trainees are highly valued members of staff. They are provided with structured training throughout their traineeship and, at an intake of twenty trainees per year, we consistently offer one of the highest number of traineeships each year of any firm or organisation in Scotland.

The training includes preparation for appearing in court in the second year of the traineeship. Appearing in court throughout the second year of the traineeship is a long-standing and essential element of the programme, and is a feature of the COPFS traineeship which accounts for the attraction of our traineeship to those entering the profession.

The overall quality of the COPFS traineeship is recognised and valued by the Law Society of Scotland and the wider legal profession. It is reflected in the significant number of applications we receive each year well in excess of the number of places which we are able to offer and the fact that our trainees are highly marketable in both the public and private sectors at the end of their traineeships. The foundation of this reputation and success is the trainee’s role in the skilled preparation, presentation and prosecution of cases in court and the high level of responsibility, accompanied by appropriate support, which goes with that.

Some parties have expressed concern to the Committee about COPFS trainees not being offered posts as prosecutors at the end of their traineeships. It is important to recognise that no employer and trainer of solicitors in Scotland, whether in the private or public sector, has ever been able to offer a guarantee of employment to trainee solicitors. We have a long tradition of recruiting into the Service as many of our trainees as possible and some former trainees have gone on to lead the organisation.
We accept that for a short period of time after the start of the financial recession we were unable to offer the number of permanent contracts which had previously been offered. Over the last three intakes, 30 have since secured permanent contracts with COPFS and a further 10 have secured fixed-term contracts.

_Sickness Absence_

We have previously provided the Committee with information about our levels of sickness absence. I accept that the present sickness absence levels are higher than the average for the Civil Service and I am strongly committed to improving this situation. Having increased each year from an average of 7.7 working days in 2010-11 to 10.3 in 2014-15, the rate of sickness absence is now decreasing slightly. In 2015-16, as of 31 October 2016, this average had decreased to 10.1.

I have mentioned the "Fair Futures" programme. I hope that these proposals, led by the views of our staff, when combined with future improvements in the criminal justice system, will reduce the level of sickness absence to those of the Civil Service average. The Committee’s focus on this issue and the information which has been gathered has been helpful.

_Prosecution Decision Making_

The Committee has been provided with a number of different views on the operation of our approach to prosecution decision making for new cases, focused on the establishment of a single team based in two locations. Concerns have been expressed about a perceived risk of failing to take account of local circumstances. Balanced against these concerns are the advantages of enhanced specialisation and concentration of resource, which will improve the efficiency of our work and the consistency of our decision making.

_National Initial Case Processing (NICP)_

I hope that some additional information about the work of NICP and context will address the concerns which have been expressed.

In 2015-16 COPFS received 225,537 criminal reports. No action was taken in 26,431 cases (11.7%). Warning letters were issued in 13,249 cases (5.8%). Direct measures (including road traffic fixed penalties, fiscal fines, compensation offers and combined offers) were issued in 47,186 cases (20.9%). The total number of cases disposed of in court in 2015-16 was 90,157.

The ten most frequent charges reported by the police over a number of years are, in order of frequency, as follows: threatening and abusive behaviour; assault; possession of drugs; speeding; theft by shoplifting; failure of drivers to insure against third party risks; consumption of alcohol in designated places; bail offences other than absconding or re-offending; vandalism, malicious damage and malicious mischief; and obstructing a constable in the pursuance of lawful duty. These most frequent charges comprise over 55% of all charges reported to COPFS. While there may be slight local variations across the country, the picture is a remarkably consistent one in all of the local courts in which we prosecute.
The Lord Advocate has made it clear, with my support, that it would not be acceptable in today’s world for a national prosecution service to apply materially different approaches to the prosecution of crime in different parts of the country. Where local circumstances justify it, the system can accommodate local variations and we will do so in a systematic and planned way.

The creation of NICP has a number of benefits besides consistency. It enables the staff who are deployed to NICP to develop expertise in this aspect of the work. It facilitates training. It also avoids prosecutors allocated to initial case processing being moved at short notice to deal with competing priorities (something which previously happened) and this assists with the planning and allocation of resource.

To enhance its work, NICP has internally structured itself into teams to reflect the six sheriffdoms in which we undertake prosecutions in local courts. This structure ensures those in each team have knowledge relevant to their sheriffdom while retaining the advantage of working together in just two locations under a single leadership structure. NICP also maintains close links with the local police divisions who can and do raise issues of local priority. Furthermore, the police can, when reporting a crime to the Crown, refer to any specific local issues which they wish to draw to the attention of the prosecutor.

Suggestions that custody courts are regularly starting later as a result of centralised decision-making are not borne out by the evidence. For example, in September 2016, Elgin Sheriff Court brought forward their custody court starting time from 2.00pm to 12 noon because they are now consistently receiving most of their custody papers earlier than had previously been the case.

A national monitoring exercise was also carried out between 29 November and 6 December to establish the time that the last custody case was sent to each court. The sample week included the day after a public holiday (29 November) and a Monday (5 December), when the number of custodies is greater than usual.

Across the country over that week, 1,373 custody cases were reported to COPFS. Only 45 of these were sent to court after 2pm, which is 3.3% of the total. These numbers include both summary and solemn cases. The latter are not marked by NICP staff but rather by specialists in our Sheriff and Jury and High Court teams. Such complex petition-level cases are often less straightforward to mark. This evidence demonstrates that the move to NICP has not resulted in custody cases being sent late to courts.

Referral for Diversion

SACRO advised the Justice Committee that “following the centralisation of case marking, we have evidence that in areas where services have long been established, referrals to alternatives to prosecution…have virtually collapsed. We have had to negotiate a way back in”. This followed a written submission in which SACRO stated that restorative justice options were not being taken up to the same levels.
The Committee asked SACRO to produce further information on this point and this shows that, across 11 services, six have seen an increase in referrals from 2014/15 to 2015/16, with two seeing a substantial increase. Five have seen some decreases, most of which can be described as minor. In any event, these referrals are not all from the Procurator Fiscal, but rather from a variety of sources such as social work, schools and the Children’s Hearing system.

This broad picture is also borne out by our own data which show that the proportion of cases referred for diversion has increased over the past few years:

- 2011-12: 0.4% (1,329 cases)
- 2012-13: 0.6% (1,952 cases)
- 2013-14: 0.7% (2,163 cases)
- 2014-15: 0.7% (1,841 cases)
- 2015-16: 0.9% (2,210 cases)
- 2016-17: 0.9% (967 cases from April to September 2016)

We greatly value the work done by SACRO and other providers of community justice referrals and we will use the information which they have provided to the Committee to build stronger links between NICP and all local providers of diversion schemes.

**Direct Measures**

By way of background, in 2015-16 10,580 conditional offers of road traffic fixed penalties were offered (4.6% of total reports received by COPFS). Fiscal fines were issued in 33,489 cases (14.8%). Compensation offers were issued in 482 cases (0.2%). Combined offers (where an individual is offered a fiscal fine and a compensation offer together) were issued in 2,635 cases (1.1%).

The Justices of the Peace who spoke to the Justice Committee on 22 November 2016 expressed their opinion that prosecutors issue direct measures to avoid the expense of prosecuting cases in court. This is inaccurate and contrary to the Lord Advocate’s policies on prosecution decision making.

The Scottish Parliament has given prosecutors a range of powers to take action against offenders and we seek to make effective use of all those powers. When a decision is made that it is in the public interest to take action, prosecutors consider a range of factors in assessing the most appropriate outcome for the case.

As well as considering the likely disposal were the case to be prosecuted in court, consideration is also given to other factors such as the nature of the offence, the need for any public condemnation of the offending behaviour, the impact on the complainer and the accused’s criminal record. It is not necessarily inappropriate to use a direct measure simply because the accused has previously been issued with a direct measure.

Where the anticipated sentencing outcome can be achieved through the use of a direct measure, there is obvious merit in using a direct measure, not least because it
offers prompt resolution for the victim instead of the uncertainty and inconvenience of court proceedings.

An independent evaluation commissioned by the Scottish Government in 2011 highlighted that the new direct measures provided by the Scottish Parliament in 2008 largely had the effects that were intended.

As the Scottish Court and Tribunal Service (SCTS) pointed out when they gave evidence to the Committee, more than 80% of direct measures are paid. Fiscal fines can be paid by instalment. If COPFS have information about the ability of an offender to pay that will be taken into account when the marking decision is made. If a fine is unpaid, SCTS will seek to recover payment by a variety of means. If COPFS consider the most appropriate way to deal with an offender may be drug or alcohol treatment or other intervention then a social work diversion will be carefully considered. Our ability to offer diversion from prosecution depends, of course, on an appropriate local service being available.

In relation to concerns expressed about direct measures being repeatedly issued to some offenders, data from SCTS show that 91% of recipients of fiscal fines in 2015/16 received only one fiscal fine. 99% did not receive more than two. In 2016/17, 95% of recipients of fiscal fines received only one fiscal fine, and again 99% did not receive more than two. This data does not bear out the concerns expressed.

**Communication with Solicitors**

COPFS recognises that effective communication with defence solicitors is essential to the justice system. I have listened with care to the concerns which have been expressed to the Committee on this point and would like to offer reassurance that COPFS will play its part, with others, in making improvements in this area.

Neither prosecutors nor defence solicitors have jobs that allow them much time to spend at their desks and be available to answer telephone calls as they are made. Prosecutors spend a lot of their time in court. Similarly, defence solicitors are often at court or meeting clients. It is therefore important that both sides of the court process work together to ensure that improvements are made in communication despite these issues. I am heartened by the views expressed to the Committee by defence solicitors who are keen to build better links with us and we will take on board their comments and the views of the Committee in developing this work.

Some lawyers have criticised the Criminal Justice Secure Mail network (CJSM). This network was made available by the UK Ministry of Justice as a means of providing secure e-mail facilities. The security restrictions on the use of email by law enforcement bodies in the UK and the general data protection principles which apply to all professionals make it inappropriate to use “general” email to share sensitive data about criminal prosecutions. It is for this reason that we facilitated the introduction of CJSM for solicitors and advocates to email prosecutors.

CJSM is a standalone web based email system. Little specification of the concerns about this system have been provided to the Committee by those who criticised it but
we accept that, being a stand-alone web system, it does not lend itself well to integration with the existing email software which most solicitors in Scotland still use and that the security measures in place require the frequent update of passwords otherwise access to the system is lost.

I am happy to confirm for the Committee that COPFS will take on board the views which have been expressed and I propose to engage with the Law Society of Scotland on the wider question of secure email for all solicitors – recognising that all professionals must have in place systems which secure compliance with the Data Protection Act and the confidentiality of clients. We are currently scoping the development of a secure website to replace CJSM which will build on the success of our Secure Disclosure Website.

Beyond improving digital communication, there is a long history of COPFS working together with local solicitors to improve communication and we will continue with such efforts in the future. Some of the more recent initiatives are:

- The creation of intermediate diet surgeries in those locations where, experience has taught us, benefits can be derived from this approach. For example, in Paisley, there has been a dedicated intermediate diet depute for the last five years although there is mixed take up by defence solicitors of the service.

- In Dumbarton, an intermediate diet surgery takes place every two weeks. The surgery is designed to secure early resolution of cases where appropriate, to identify and seek agreement of uncontroversial evidence and to ensure cases proceeding to trial are focussed on those matters in dispute. The Dumbarton Bar are supportive of this initiative which works well.

- In Grampian, Highlands and Islands, there is a COPFS initiative to identify proactively accused persons with multiple cases to solicitors. The goal of the initiative is to identify those accused where a global resolution of all of an accused’s criminal offending before the courts might be available. The scheme involves a senior legal member of staff within Grampian, Highlands and Islands writing to agents identifying those accused with multiple cases and offering to meet to discuss same. The initiative has, unfortunately, had little response from local solicitors.

- COPFS have dedicated plea hotlines in a number of offices including Ayr and Glasgow. In Ayr, the hotline is manned by a senior depute but this is not utilised to any significant extent by the local solicitors.

- In Tayside, Central and Fife there is an initiative to communicate with the defence in relation to sheriff and jury business. A weekly email is issued to all solicitors who have advised that they wish to be included in the circulation list, to provide them with advance information confirming which prosecutor is conducting each sheriff and jury sitting and first diet court across Tayside Central and Fife in the coming weeks. The email includes all direct telephone numbers for relevant COPFS staff.
• There is a sheriff and jury case resolution e-mail box for Fife and Central cases. This is to encourage defence solicitors to e-mail this dedicated address if they wish to contact the Crown about any matter relating to the potential resolution of an S&J case. There is an undertaking to respond to emails sent to that address within two working days.

Looking ahead, we are also preparing to introduce in each local sheriffdom a service for local solicitors to contact a dedicated prosecutor who will have the ability and authority to consider cases with a view to reaching a resolution before trial. This process was piloted in 2015/16 in Lothian and Perth and was considered to be a success. During the implementation phase we will ensure that the needs of local solicitors are taken into account.

Enquiry Point

The Committee has been advised that people find it difficult to contact us through the Enquiry Point (EP). This receives between 1,200 and 2,000 calls per day and is staffed to reflect the different times of day at which peak calls are made. The average waiting time generally varies between one and four minutes. We accept that we can continue to improve the service which is offered. For example, we are giving active consideration to the potential benefits of embedding prosecutors with the EP.

There has also been criticism of the 0844 number used by COPFS. We continue to make every effort to minimise costs to callers by making available local geographic number options (including for our Enquiry Point) and publishing these local numbers on our corporate and business communications, letterheads and in external emails. Plans are also underway, as I advised in December, to move to a new 0300 number range. Calls to 0300 numbers will cost the same or less than calls to 01 and 02 prefixed numbers and are included as part of any inclusive minutes or discount packages. These rules apply to calls from any type of line including mobile, BT and other fixed line or payphone. COPFS expects to complete the transition to 0300 numbers by spring 2017. The new telecoms contract is additionally expected to save us in excess of 15% of our annual telephone costs.

Communication with Victims and Witnesses

The Committee has heard from several individuals about their experience of the criminal justice.

While these accounts include some direct criticism of COPFS which we regret and will seek to learn from, the treatment of victims and witnesses is a system wide issue. As prosecutors, we can only do our job if victims and witnesses are willing to come forward and give evidence, and we can only vindicate the requirements of justice if victims and witnesses are enabled to speak up within the criminal justice system and to give their evidence effectively. Our responsibilities as prosecutors accordingly demand that we engage appropriately with victims, and seek to provide appropriate information to victims who are involved in the criminal justice process.
At the same time, it is important to acknowledge that the support which we provide to victims is set in the context of our fundamental responsibility, which is the prosecution of crime. Our VIA officers provide appropriate information to victims, to help support them through the criminal justice process and link with other agencies who provide wider support. But, as the Committee will appreciate from the evidence which it has heard, victims have much wider needs. We accept that there is a gap between the service which we can provide and the service which we would like to see victims receive from the system as a whole. It is for that reason that I am pleased to advise the Committee of the publication of the Review of Victim Care in the Justice Sector in Scotland on 11 January by the former Solicitor General for Scotland, Lesley Thomson QC, who has consulted widely and made recommendations which seek to address this gap. The report has been provided to the Justice Board. COPFS will fully support her recommendations and is committed to the necessary further work in this area.

It is important to put this in the context of the remarkable change in the approach which all criminal justice agencies take to victims of crime as compared with the position a short time ago. COPFS has been in the forefront of that cultural change. Before the creation by COPFS of its VIA service in 2002, victims were treated essentially like other witnesses, and their needs were not catered for at all by the system. The position of victims has been further enhanced across the criminal justice system by the Victims and Witnesses (Scotland) Act 2014.

I acknowledge that the demands on the VIA service have increased significantly over time. In 2014/15 approximately 40,000 victims were referred to VIA for information and advice compared to 27,500 victims in 2006/2007 - a 45% increase. The Victims and Witnesses (Scotland) Act 2014 heralded changes that impact upon the workload of VIA. All those aged under 18 are now regarded as child witnesses and are therefore entitled to enhanced support and protection. The 2014 Act also created a new category of deemed vulnerable witness who, in addition to all children, are entitled to use special measures. The Act has seen the number of vulnerable witness applications more than double.

The Committee will be interested to note that there are already improvements under way. These include:

- We have asked the Scottish Government for a legislative change to remove the need for a written notice for child or deemed vulnerable witnesses to use standard special measures in court;
- The VIA review recommended a new structure with stronger local line management by experienced VIA staff who will be linked through our internal Victims Forum which we made a commitment to establish by March 2017. This will be chaired by a senior civil servant and will include members of VIA and also specialist prosecutors for Domestic Abuse, Stalking, Sexual Offences. We hope this will be further strengthened by establishing a criminal justice network including COPFS, the police, Victim Support Scotland and SCTS;
- SMS texts are increasingly used as a means of contacting witnesses (except child witnesses) in a convenient manner. They are sent to all civilian
witnesses for whom we hold a mobile telephone number for three purposes: notification of witness citation; reminder to return the reply form; and a reminder to come to court. The benefits of using texts in this way are improved and convenient contact with witnesses, improved attendance at court, and reduction in the number of personal citations required after failed postal citation. More than 28,000 texts were sent between July and September 2016. We intend to expand its use to sheriff and jury cases as part of the pending reforms in that area;

- The letters issued by VIA are the subject of ongoing review and are in the process of being revised. We will take on board the comments to the Committee in relation to the content of our communications.

**Case Preparation**

*Sufficiency of Evidence*

I have taken careful note of the comments by some who appeared before the Committee expressing concern that prosecutions are being taken up in the face of insufficient evidence. I wish to reassure you that this is not the case.

Prosecutors cannot take proceedings in any case where there is insufficient evidence that a crime has been committed and that the accused committed that crime. This key principle is outlined in The Prosecution Code. It would be entirely improper for any prosecutor knowingly to initiate or continue proceedings in a case where there is known to be insufficient evidence and I would regard it as a serious disciplinary matter to do so.

There are numerous examples of cases, some of them very high profile, in which prosecutors have not prosecuted because of insufficient evidence, sometimes in the face of strong views to the contrary by victims and even wider public opinion.

Between 2014 and 2016, decisions not to prosecute due to there being insufficient evidence were taken in 4.7% of reported cases. In domestic abuse cases, no action was taken in 7% to 8% of reported cases over that same two-year period. The suggestion that prosecutors are more likely to initiate proceedings in domestic abuse cases notwithstanding that there is insufficient evidence in law is not supported by this data. The conviction rate for domestic abuse cases is 80%.

*Sheriff and Jury Prosecutions*

The Committee has also heard opinions about the preparation of solemn cases in the Sheriff Court. There are a number of critical stages in the preparation of a solemn case at which sufficiency of evidence is analysed by prosecutors:

1. The first stage is at the initial marking stage. An accused person can appear on petition warrant on the strength of one source of evidence. However, the case will be assessed at the marking stage to establish whether there is a reasonable prospect of obtaining sufficient evidence in due course.
2. If bail is refused, the accused must appear again in court within eight days. During that eight-day period the prosecutor instructs the police to submit the evidence gathered and instructs any further investigations to ensure that a sufficiency of evidence is secured. On receipt of this evidence, the prosecutor reviews the case and assesses it to ensure that there is evidence from at least two sources. Only if sufficient evidence exists can the prosecutor move to fully commit the accused for trial. The prosecutor must additionally satisfy the court and the defence solicitor at full committal stage that at least two sources of evidence exist.

3. The next point in the process comes during the allocation process. The legal manager reviews the case to identify the sources of evidence and instructs the case preparer (who may or may not be a prosecutor) how to prepare the case in the context of the sufficient evidence required.

4. The case preparer, following the ingathering and assessment of all of the evidence, conducts an analysis of the case and prepares a recommendation in respect of whether proceedings should be taken and upon what charges.

5. The case preparer transfers the case to the legal manager who reviews the case and the analysis presented. This is at least the fourth time in a custody case (and the third time in a bail case) that the case is assessed for sufficiency by a prosecutor.

6. The case is then submitted to Crown Office, where expert indicting colleagues and/or Crown Counsel examine it and make an assessment as to whether the recommendation is appropriate. Only if there is sufficient evidence to proceed will instructions be given to indict the case.

Thus it is clear that in a solemn case, as a matter of course, assessment for sufficiency is carried out six times in a custody case and five times in a bail case. At all but one of these stages the assessment is carried out by a prosecutor. Cases will also be re-considered as necessary for sufficiency when new matters come to light, such as material provided by the defence prior to trial.

Any prosecutor who has concerns about sufficiency of evidence is always encouraged to speak to their manager. The managers of COPFS are committed to ensuring that cases are effectively prepared and appropriately prosecuted where there is sufficient evidence to do so.

Precognition of witnesses and disclosure of evidence

The Committee has been advised that COPFS has stopped or reduced the precognition of witnesses in order to save money. This is a misunderstanding of the position. It is also worth pointing out at this stage that there has never been a practice of precognition in our summary case preparation.
“Precognition” of witnesses is the process of Crown interviewing of witnesses. The historic position in relation to precognition by the Crown reflected a situation in which the Crown had no obligation to disclose evidence to the accused, where it was assumed that the defence would also be precognosing witnesses, and where precognitions, by either party, could not be produced in evidence. The position today is quite different.

It is correct that the precognition of witnesses in solemn cases is no longer done as a matter of routine. Precognition is now restricted to the cases and witnesses in which, despite the potential risks outlined below, 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.

The driver for this change in practice was the introduction of disclosure of the Crown’s evidence to the accused. This was introduced suddenly in 2005, as a result of case law. In the early days of the new disclosure requirements, the Crown found that the process of precognition frequently caused difficulties which outweighed the potential benefits. This was because, unlike statements taken from witness by the police, precognitions taken by the Crown are not in themselves disclosable (nor are they, technically, statements which can be used in evidence in the way that a police statement can be) although any information obtained in the process could be disclosable.

The view was taken, in these circumstances, that the more appropriate method of obtaining clarification of a witness’s 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, not by any decision by COPFS to reduce the cost of case preparation.

It is also inaccurate to suggest that there is no input by prosecutors into disclosure decisions. There are a variety of processes involved in the disclosure of material, including a comprehensive disclosure schedule in each solemn case. Each solemn case has a legal manager assigned to it and it is this legal manager who will work with the case preparers to identify material to be disclosed and redacted.

**Churn**

The Committee has focused its attention on the issue of churn, particularly in the summary courts and has heard a number of views about its causes. Audit Scotland has endorsed the view that the causes of churn are multiple and complex and the solution to improving the system lies with all parts of the system. This is a high priority for COPFS and the Justice Board and, alongside our work to develop improved digital methods of preparing and presenting cases, we are committed to working with the police, courts and defence solicitors, principally through the Evidence and Practice Review, to reform the system in ways which should increase the number of cases which resolve at the earliest opportunity. The resource which would be released would be available to focus on the cases which are likely to go to trial.
Professional Judgment

The Committee has heard a variety of accounts regarding the discretion of Procurators Fiscal, particularly within the context of domestic abuse cases. These accounts are presented as a recent development which hinders the operation of the courts and put forward the alternative view that an individual prosecutor should be free to take a different view of our prosecution policies if that is judged to be appropriate.

The Lord Advocate and I are strongly committed to reinforcing the exercise of judgment by professional prosecutors. Procurators Fiscal, however, have never had an unfettered discretion in exercising their judgment. The position was described in an academic text (“The Attorney General, Politics and the Public Interest”, J Edwards) in 1984 as follows:

“In short, whilst the procurator fiscal has undoubted discretionary powers his discretion is limited and conditional, the ultimate authority residing in the Lord Advocate and ... (Crown Counsel).”

The accounts which have been presented to the Committee on this point, including from those with experience of prosecution, reflect a change in the last fifteen years to standardise the exercise of that discretion across the country. At the time this quote was written, local Procurators Fiscal were able to set their own local limits on discretion within their court but this led, in modern times, to justified criticism that similar offences were being prosecuted in different ways in different courts, depending on the view of the local procurator fiscal. Since then, as part of our modernisation efforts, we have sought to ensure that a broadly consistent approach is taken to offending in all local courts, while allowing for local discretion to respond to particular local issues.

Since the Lord Advocate took up appointment he has emphasised the responsibility of the individual prosecutor. He believes that it is good for the quality of decision making if the professional lawyers who prosecute in our courts take responsibility and know that they are trusted by him and by the Service to take responsibility and to exercise judgment.

This does not mean, however, that prosecutors are free to disregard the policies which are set by the Lord Advocate. It is the Lord Advocate’s constitutional responsibility to set prosecution policy, and it is the responsibility of prosecutors to implement the Lord Advocate’s prosecution policies. That consistent application of policy is simply a reflection of the rule of law imperative that like cases should be treated alike. But, at the same time, as the Lord Advocate has said publicly, it is for individual prosecutors, exercising their own skill and judgment, to apply the prosecution policies to the individual cases with which they deal.

We recognise and accept that this issue is a cultural one and that robust and entirely appropriate prosecution policies for certain offending may have led to a perception - including amongst our own staff - that the ability to exercise professional judgement
has been curtailed. We are now seeking to address this through the review of prosecution policies.

**Domestic Abuse Cases**

The Committee has heard a significant amount of information about our approach to the prosecution of domestic abuse. Concerns have been expressed about the approach and its impact across the system.

Attitudes in Scotland to domestic abuse have changed markedly in recent years and COPFS and the police have worked closely with experts in this area in order to support that change. Behaviour that was once dismissed as a private matter is now treated by both the police and COPFS as a very serious concern. Where sufficient evidence exists, there are strong presumptions in favour of prosecution and continuation of prosecution.

This approach remains unpopular with some elements of society, including some defence solicitors and judges, and even some police officers and prosecutors. While some criticism is directed to the policy itself, much of the criticism is directed to the way in which it is seen to be implemented in cases which are judged by others not to be of a level of seriousness which should have resulted in prosecution or to be such that some other approach should have been followed.

It is for the Lord Advocate, and the Lord Advocate alone, to set prosecution policy. Sometimes the policies he sets are not universally popular, and nor should they be. The role of the prosecutor is not to be popular, but to make the right decision in the public interest without fear or favour. Prosecutors must prosecute in accordance with the Lord Advocate’s policies, even in cases where an individual prosecutor disagrees with those policies.

Our approach to domestic abuse is firm and rigorous but based on principle. Prosecutors can only take action in a domestic abuse case where there is a proper basis for concluding that there has been criminality. The joint protocol between COPFS and Police Scotland clearly states that the police should only report cases where there is sufficient evidence in law to support a prosecution. Clearly there are some cases where COPFS and the police will disagree over whether there is sufficient evidence to support a prosecution, but that has always been the case. To suggest that the police are forced to detain suspected offenders where there is insufficient evidence or that prosecutors knowingly prosecute such cases as a result of the policy is entirely inaccurate.

Domestic abuse cases can be difficult to prosecute. Complainers sometimes, for intelligible reasons, become unwilling to give evidence. Notwithstanding these potential difficulties, the conviction rate in domestic abuse cases is 80%.

**Specialism and Complex Casework**

A number of those who provided information to the Committee about our approach to complex casework have made some criticisms of our approach which I should like to address.
COPFS has a number of specialist units which have built up significant expertise, including in sexual offences, serious and organised crime, international cooperation, health and safety, and wildlife crime. Some of most complex cases which were previously the responsibility of local prosecutors who were increasingly expected, unreasonably, to master many different areas of specialism alongside their local court responsibilities now fall to these teams. The very positive written submissions provided from bodies such as HMRC reflect the benefit of this new approach and the expertise that COPFS has built up.

Our aim is to provide expert, thorough and timely investigation and preparation of specialist casework and proceedings and some additional details on the work of some of our specialist teams is provided below as helpful context.

**Sexual Offences**

The increased reporting of sexual offences in recent years has led to the creation of specialised sexual offence units at local level and in our High Court teams, led by the National Sexual Crimes Unit.

The available data reflect the impact of the increased reporting of these crimes, with sexual offences investigations and cases currently making up 71% of the overall High Court caseload for COPFS. In particular the number of charges of rape or attempted rape reported to COPFS has more than doubled since 2010. There were 660 charges of rape and attempted rape in 2010-11 which then increased to 1,720 in 2014-15, and 1,440 in 2015-16.

Training in this area of work has been expanded for prosecutors and VIA and now includes courses dedicated to victims and witnesses, interviewing child witnesses, sexual offences (including human trafficking), domestic abuse, stalking, and abuse in institutions.

Our Learning and Development Division now has 14 members of staff, including four lawyers, and one of the aims of this division is to continue to improve how we prosecute sexual offences, domestic abuse and stalking.

**Serious and Organised Crime**

The Serious and Organised Crime Unit (SOCU) has primary responsibility for the investigation and prosecution of serious and organised crime. These cases are some of the largest and most complex cases dealt with by COPFS. The types of offences dealt with include misuse of drugs, fraud, money laundering, directing serious and organised crime, murder, terrorism-related offences, bribery, tax evasion, data protection, human trafficking, insolvency, breaches of directors’ duties, corruption, legal aid fraud and perjury.

Additionally, SOCU’s proceeds of crime team is responsible for the restraint or confiscation of cash which is identified as the proceeds of crime. These tools are crucial in ensuring that individuals who are involved in criminal behaviour do not profit from it. During the last three financial years the unit has overseen 224 restraint
orders with a total of more than £33 million restrained and has been granted 549 confiscation orders with a total of almost £13 million confiscated. During the current financial year there has been over £6 million restrained and over £2.5 million confiscated to date.

**International Cooperation**

The International Co-operation Unit (ICU) functions as the Central Authority in Scotland for all aspects of international criminal co-operation. It handles all incoming and outgoing extradition cases, and deals with all incoming and outgoing requests for mutual legal assistance, other than those enquiries passing between police forces for the purposes of gathering criminal intelligence.

ICU received 260 incoming requests for mutual legal assistance in 2013, 304 in 2014, and 441 in 2015. The Unit also made 224 outgoing requests for mutual legal assistance in 2013, 211 in 2014, and 203 in 2015. Proceedings were taken in a Scottish court following an arrest on a European Arrest Warrant in 99 cases in 2013, 89 cases in 2014 and 137 cases in 2015.

In addition to this there were 93 extraditions from Scotland to other countries in 2013, 39 in 2014 and 78 in 2015. There were also 12 individuals extradited in to Scotland from other countries in 2013, 12 in 2014 and 9 in 2015.

**Wildlife and Environmental Crime**

Wildlife and environmental crime enforcement is challenging because of the complexity of the law and the evidential difficulties which can be posed by the nature of the offending.

Our specialist team, WECU, receives reports from the police, SEPA, Scottish SPCA (“SSPCA”) and local authorities. In the financial year 2013/14 there were 414 cases identified as WECU cases, in 2014/15 there were 520 cases and in 2015/16 there were 256 cases.

I have carefully considered the information given to the Committee about our work with agencies which report these cases and groups which have a strong interest in the effective prosecution of them, such as the RSPB. While there is much to be pleased about it in terms of our new specialised approach to this area of offending, I am satisfied that we should now renew our efforts to build stronger relationships with those interest groups.

**Health and Safety Cases**

The Association of Personal Injury Lawyers has made some specific criticisms of expertise in relation to Health and Safety cases. In particular, it makes criticisms of the low prosecution rate for failure to hold employer’s liability insurance and, more generally, the time taken to bring effective prosecutions.

Specialist prosecutors in the Health and Safety Division (HSD) lead the prosecution of all health and safety cases throughout Scotland. They act on the basis of cases
reported to them, including, in particular, cases reported by HSE. 106 cases were reported to HSD in 2014, 109 were reported to it in 2015, and 106 were reported to it in 2016. The prosecution rate for cases reported to HSD is consistently in excess of 80% and the conviction rate for cases prosecuted is well in excess of 90%.

Against this background of success, we are, in response to this inquiry, exploring with the relevant reporting agencies why we receive very few cases in respect of employer’s liability insurance. Should it become clear that there is a need to take more effective enforcement action in this regard then that will become part of our regular liaison with those agencies.

In relation to the time taken to investigate and prosecute such cases, I can assure the Committee that this is not, as has been suggested, because we treat the cases as if they were civil litigation or allow accused unreasonable periods of time to resolve the cases. The reality is that health and safety investigations are frequently highly complex both in relation to the facts and the legal responsibilities of the various potential duty holders.

Cybercrime

The Committee is interested in understanding the impact of cybercrime on our work and our capability to deal with it. The term “cybercrime” is defined in a number of different ways depending on the context in which it is encountered. A distinction is now generally made between cyber-enabled crime and cyber-dependant crime.

Cyber-enabled crime relates to ‘traditional’ offences which are now often facilitated or conducted over the internet or by some other digital means. Examples of cyber-enabled crime might include an individual using social media to send one or more threatening or abusive messages to an individual or a group thereby committing an offence under sections 38 or 39 of the Criminal Justice and Licensing (Scotland) Act 2010 or a breach of the peace.

Cyber-dependant crime relates mainly to offences known colloquially as ‘hacking’ and includes DDoS attacks (denial of delivery of service) where the attack overwhelms a company’s or organisation’s capability to operate on line. These offences can only be committed using computers, computer networks or other forms of information communication technology.

COPFS has a National Lead Prosecutor for Cybercrime who is a Senior Civil Servant. He provides, with the assistance of colleagues, a point of contact for Police Scotland and provides guidance for COPFS staff on cybercrime issues when required. There are regular meetings with Police Scotland to discuss issues arising from cybercrime and there has been work completed in recent years on improving the process for requesting analysis of digital media and the changing of the indecent images classification standards. Current issues being explored include the seizure, retention and early return of digital devices; the extent of examination in child sexual exploitation cases, and the possible requirements for warrants and the admissibility of cloud based storage. The national lead also provides cases specific advice to the police and has successfully prosecuted an international cyber-enabled crime in Edinburgh Sheriff Court.
Cybercrime issues are dealt with by prosecutors as and when they are encountered. Volume phone evidence, including social media in domestic abuse and sexual offence cases, is arguably the most common, but not particularly technical. It is simply an evolving means of communication and is routinely used in evidence. The police have been particularly successful in dealing with child sexual exploitation online in detecting and arresting contact abusers in addition to those who simply view such material. Such cases are normally dealt with by our sexual offences teams. Reported cyber-dependent offences are relatively low in number.

The Committee will recognise that cybercrime – whether cyber-enabled crime or cyber-dependent crime – can present particular challenges for law enforcement. By its nature, it is not constrained by national boundaries, and identifying and locating the perpetrator may present particular difficulties. In that context, it is important to recognise the importance of prevention—of enhancing cyber-resilience—though we will, of course, where we can, work with the police and other agencies, including agencies in other countries, to pursue those involved in cybercrime.

Conclusion

I have provided a significant amount of additional information to respond to some of the issues which have been raised before the Committee. On some issues, the Committee has heard evidence which includes expressions of opinion and a degree of speculation. I have sought, so far as possible, to provide factual information, and data. I hope that, in addition to appearing before the Committee on 17 January, this information will help to set the context for many of the issues which have been raised before the Committee.

I am grateful to the former Solicitor General for her recently published report on the ways in which the justice system as a whole can improve the wider service which is provided to victims. Her experience as a prosecutor and consultation with those who understand the needs and concerns of victims has been invaluable.

In conclusion, as the professional head of the Service, I wish to record my appreciation to the Committee for the keen interest which it has shown in our work. The Committee’s inquiry, and the evidence which it has heard, have provided us with an opportunity to reflect on our current plans, to build on the good work which has been done before, and to take on board the comments and views of those with whom we work and those we serve. 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 which will provide us with a justice system appropriate for Scotland’s needs in the 21st century. In due course, we look forward to the Committee’s report as part of that effort.

David Harvie
Crown Agent
13 January 2017