

# SPICe Briefing

## The Scottish Criminal Justice System: The Criminal Courts

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Frazer McCallum

This briefing is one of six covering various aspects of the Scottish criminal justice system. It provides a brief description of the operation of the criminal courts in Scotland.

The other five briefings in this series are:

- [The Scottish Criminal Justice System: Legal and Administrative Arrangements](#)
- [The Scottish Criminal Justice System: The Police](#)
- [The Scottish Criminal Justice System: The Public Prosecution System](#)
- [The Scottish Criminal Justice System: The Prison Service](#)
- [Children and the Scottish Criminal Justice System](#)



# INTRODUCTION

Scotland has a three-tier criminal court system. These are, in order of precedence, the High Court of Justiciary (the High Court), the sheriff courts and justice of the peace courts. In addition, the UK Supreme Court (located in London) can also become involved in some criminal cases as a result of its role as the ultimate court of appeal in relation to devolution issues.

The [Scottish Courts](#) website provides a wide range of information on the courts in Scotland.

## Criminal Procedure

Criminal procedure (ie the procedure for the investigation and prosecution of crime) is mainly regulated by the Criminal Procedure (Scotland) Act 1995 and is divided into solemn and summary procedures.

Solemn procedure involves the most serious of criminal cases and may ultimately lead to a trial on indictment, either before a judge in the High Court or before a sheriff in one of the sheriff courts. Trials under solemn procedure are conducted with a jury.

Summary procedure is used for less serious offences (with the charges set out in a complaint) and may ultimately lead to a trial before a sheriff or, in justice of the peace courts, before a bench of one or more lay justices. In Glasgow's justice of the peace court, cases are also heard by legally qualified stipendiary magistrates. Trials under summary procedure are conducted without a jury.

The choice of whether to prosecute a case under solemn or summary procedure is made by the prosecution service, known as the [Crown Office & Procurator Fiscal Service](#) (COPFS), and affects the sentences available to the court on conviction. The vast majority of criminal court cases are in practice dealt with under summary procedure – 96% of criminal court disposals during 2010-11 were in the summary courts (COPFS data on [Case Processing – Last 5 Years](#)).

It may also be noted that most court cases, under both solemn and summary procedures, are concluded without evidence being led at a trial. For example, in 2010-11 the percentages of court cases disposed of by a trial (where at least some evidence was led) were: 40% of High Court cases; 23% of sheriff court cases under solemn procedure; 8% of sheriff court cases under summary procedure; and 4% of justice of the peace court cases (COPFS data on Case Processing – Last 5 Years).<sup>1</sup>

## Verdicts

Three verdicts are available to a judge or jury: guilty, not guilty, and not proven. The implications of a not proven verdict are the same as a not guilty verdict in that the accused is acquitted and is generally free from further prosecution on the matter in question.<sup>2</sup>

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<sup>1</sup> Cases dealt with by stipendiary magistrates are included in the summary sheriff court rather than justice of the peace court figures.

<sup>2</sup> This freedom from further prosecution will be subject to a number of exceptions when the relevant provisions of the Double Jeopardy (Scotland) Act 2011 are brought into force.

## Juries

As noted above, juries are only used in the Scottish criminal justice system where a case is tried under solemn procedure. In such cases, the judge or sheriff decides questions of law, with the jury deciding questions of fact. In summary cases, both of these functions are performed by the sheriff, lay justice or stipendiary magistrate.

A jury in a Scottish criminal case is made up of 15 people, with an eight to seven majority being sufficient to establish guilt.

## Administration

The [Scottish Court Service](#) (SCS) is responsible for providing the staff, buildings and technology to support Scotland's courts – including the High Court, sheriff courts and justice of the peace courts (but not the UK Supreme Court).

In April 2010 the SCS was established as an independent body by the Judiciary and Courts (Scotland) Act 2008 (prior to which it was an executive agency of the Scottish Government). It is governed by a corporate board chaired by the Lord President (the most senior judge in Scotland).<sup>3</sup>

## Sentences Imposed

The most common sentence imposed by Scottish courts is a fine. In 2009-10, for example, fines were the main penalty imposed in relation to 59% of convictions. They were followed in order of frequency by: community sentences (13%); custodial sentences (13%) and caution or admonition (13%) (see Scottish Government 2011, table 7). Of those given custodial sentences in 2009-10 (see table 10(a)):

- 38% were of three months or less<sup>4</sup>
- 32% were over three months to six months
- 22% were over six months to two years
- 5% were over two years but less than four years
- 3% were of four years or more

## The Scottish Criminal Cases Review Commission

The [Scottish Criminal Cases Review Commission](#) was set up in April 1999 to consider alleged miscarriages of justice and to refer appropriate cases to the High Court for review. Where a convicted person has already appealed against conviction and/or sentence, the Commission is able to look into the matter again. Normally, it will only look into a case after an appeal has been heard by the High Court. Where the Commission does refer a case for review, it is up to the High Court to decide whether or not to overturn a conviction, change a sentence or give authority for a new prosecution.

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<sup>3</sup> The Lord President is referred to as the Lord Justice General within a criminal court context (ie in relation to his role in the High Court).

<sup>4</sup> Section 17 of the Criminal Justice and Licensing (Scotland) Act 2010 (in force since 1 February 2011) now sets out a presumption against imposing custodial sentences of three months or less.

Prior to its establishment, the power to refer cases back to the High Court for review was exercised by the Secretary of State for Scotland.

## COURTS

### High Court of Justiciary

The High Court is Scotland's highest criminal court (subject to the role of the UK Supreme Court in relation to devolution issues). It sits as a court of first instance or trial court (ie a court dealing with the original case against an accused) and as a court of criminal appeal.

The two senior judges in the High Court are known as the Lord Justice General and the Lord Justice Clerk. More information on High Court judges is provided on the Judiciary of Scotland website under the heading of [Senators of the College of Justice](#).<sup>5</sup>

As a trial court, its jurisdiction extends over the whole of Scotland (and sometimes beyond) in respect of all crimes unless excluded specifically or through implication by statute. It has exclusive jurisdiction to try the most serious crimes such as treason, murder and rape and, in practice, deals with other serious crimes such as armed robbery, drug trafficking and sexual offences involving children (even where it is competent for these to be tried by a sheriff sitting with a jury). It sits regularly, in its role as a trial court, at various locations throughout Scotland and can impose sentences of up to life imprisonment. Cases are tried by a judge and jury under solemn procedure.

Prosecutions in the High Court are brought in the public interest in the name of the [Lord Advocate](#) (head of the COPFS) and are generally prosecuted by advocate deputes. Private prosecutions are possible in Scotland but are extremely rare. An advocate or solicitor advocate will usually conduct the defence, although accused persons are normally also permitted to conduct their own defence in person.<sup>6</sup>

In its role as a court of appeal, it sits only in Edinburgh and deals with appeals from the High Court acting as a trial court, and from sheriff and justice of the peace courts. At least three judges will hear the case where there is an appeal against conviction, and at least two where the appeal is against sentence alone.

### Sheriff Courts

There are six sheriffdoms in Scotland, each headed by a sheriff principal:

- Glasgow & Strathkelvin
- Grampian, Highland & Islands
- Lothian & Borders
- North Strathclyde
- South Strathclyde, Dumfries & Galloway

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<sup>5</sup> The same judges sit in both the High Court and the Court of Session (the highest civil court within Scotland). The two courts are sometimes referred to as the supreme courts – not to be confused with the UK Supreme Court.

<sup>6</sup> Solicitors, as well as advocates and solicitor advocates, can represent accused persons in the other criminal courts (sheriff and justice of the peace courts).

- Tayside, Central & Fife

Each sheriffdom, apart from Glasgow & Strathkelvin, is divided into sheriff court districts for administrative convenience. There are a total of 49 sheriff courts throughout Scotland. A sheriff principal or sheriff deals with summary cases (sitting alone) or with solemn cases (sitting with a jury).<sup>7</sup> More information on [sheriffs](#) is provided on the Judiciary of Scotland website. The prosecution is conducted by the local procurator fiscal or one of the procurator fiscal deputies.<sup>8</sup>

The sheriff courts are the most important of the inferior criminal courts in terms of jurisdiction (sheriff courts also have jurisdiction in relation to civil matters). They can try any crime not reserved to the High Court including those which can be tried in justice of the peace courts.<sup>9</sup> In relation to caseload, sheriff courts are also the most important courts. Of approximately 111,000 criminal court disposals in 2010-11:<sup>10</sup>

- 37% were in justice of the peace courts presided over by lay justices
- 59% were in summary sheriff courts (or in stipendiary magistrate courts)
- 4% were in solemn sheriff courts
- 1% were in the High Court

In relation to sentencing, a sheriff court sitting as a court of summary jurisdiction is generally limited by the following maximum sentences: (a) a custodial sentence of 12 months; and (b) a fine of £10,000.<sup>11</sup> The general limits may, where a statute has been contravened, be subject to a higher or lower maximum provided for in the statute.

When sitting as a court of solemn jurisdiction a sheriff court may impose a maximum custodial sentence of five years and can impose an unlimited fine.<sup>12</sup> Where the sheriff considers that these sentencing powers are insufficient, the case can be remitted to the High Court for sentencing.<sup>13</sup>

## Justice of the Peace Courts

Justice of the peace courts were created by the Criminal Proceedings etc (Reform) (Scotland) Act 2007, replacing the former district courts (administered by local authorities) on a sheriffdom by sheriffdom basis between 2008 and 2010.

They are courts of summary criminal jurisdiction only, with cases being dealt with by a bench of one or more lay justices or alternatively, in Glasgow's justice of the peace court only, by legally qualified stipendiary magistrates. The prosecution is conducted by the local procurator fiscal or one of the procurator fiscal deputies.

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<sup>7</sup> Each sheriffdom has a sheriff principal with administrative responsibilities in relation to the conduct of the sheriff courts in that sheriffdom. A sheriff principal also has the power to hear appeals in civil cases, but not in criminal cases. In other respects, the powers of a sheriff principal and a sheriff are the same.

<sup>8</sup> In particularly difficult cases an advocate depute may appear for the Crown.

<sup>9</sup> Section 3(6) of the Criminal Procedure (Scotland) Act 1995 provides that, subject to any express statutory exclusion, "it shall be lawful to indict in the sheriff court all crimes except murder, treason, rape (...), rape of a young child (...) and breach of duty by magistrates". The territorial jurisdiction of the court is regulated by section 4 of the 1995 Act.

<sup>10</sup> See COPFS data on Case Processing – Last 5 Years.

<sup>11</sup> Sections 5 and 225(8) of the Criminal Procedure (Scotland) Act 1995.

<sup>12</sup> Section 3(3) of the Criminal Procedure (Scotland) Act 1995.

<sup>13</sup> Section 195 of the Criminal Procedure (Scotland) Act 1995.

Justice of the peace courts generally deal with less serious cases, with jurisdiction over many cases dealt with by sheriff courts being excluded (eg robbery or theft by housebreaking).<sup>14</sup> As the lowest level of criminal court, justice of the peace courts have the most limited sentencing powers. Lay justices can impose custodial sentences of up to 60 days and can impose fines of up to £2,500 (unless a lower or higher statutory maximum is specified for a particular offence).<sup>15</sup> Stipendiary magistrates have the same sentencing powers as a sheriff sitting in a summary court.

Further information about justice of the peace courts is available on the website of the [Scottish Justices Association](#).

## UK Supreme Court

The UK's [Supreme Court](#) (established by the Constitutional Reform Act 2005) is the highest court in the UK. It took over the functions of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council in October 2009. Whilst it is the final court of appeal for Scottish civil cases, the High Court (in Edinburgh) is generally the final court of appeal for Scottish criminal cases. However, the Supreme Court can also become involved in Scottish criminal cases. This possibility arises from the fact that it is the ultimate court of appeal in relation to devolution issues.

The Scotland Act 1998 provides mechanisms for the judicial determination of disputes over the legal limits of Scottish Parliament legislative powers and Scottish Government functions. Where such a dispute arises as part of court proceedings dealing with other issues (eg during a criminal prosecution), the particular point relating to legislative or administrative competence may be dealt with as a devolution issue. Given that the Lord Advocate is both the head of the system of public prosecution in Scotland and a member of the Scottish Government, criminal prosecutions must be conducted in a way which does not contravene the limits placed on Scottish Government functions by the Scotland Act. For example, in general they must not contravene various rights set out in the European Convention on Human Rights, including the right to a fair trial.

The role of the Supreme Court in relation to Scottish criminal cases has been highlighted in a number of recent high profile decisions. In particular, in the cases of [Fraser v HM Advocate](#) (2011), in which it held that the non-disclosure of certain evidence by the prosecution had infringed the accused's right to a fair trial, and [Cadder v HM Advocate](#) (2010), in which it ruled that a person who has been detained by the police on suspicion of having committed an offence has the right of access to a lawyer prior to being interviewed.

At the time of writing, the question of whether the role of the Supreme Court in relation to devolution issues has effectively allowed it to usurp the proper role of the High Court as the final court of appeal in criminal cases is the subject of ongoing debate (eg see [Devolution Issues and Acts of the Lord Advocate](#) (Advocate General for Scotland) and [Supreme Court Review](#) (Scottish Government)). Some changes to the role of the UK Supreme Court in relation to acts of the Lord Advocate may be made by the UK Parliament's [Scotland Bill 2010-11](#).<sup>16</sup>

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<sup>14</sup> A justice of the peace court when constituted by a stipendiary magistrate has the summary criminal jurisdiction and powers of a sheriff (section 7(5) of the Criminal Procedure (Scotland) Act 1995).

<sup>15</sup> Section 46 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 (not yet in force) sets out powers allowing the Scottish Ministers to amend, by statutory instrument, the maximum sentencing powers of lay justice of the peace (up to a maximum custodial sentence of six months and a fine of £5,000).

<sup>16</sup> The second reading of the Scotland Bill in the House of Lords (it started in the House of Commons) is scheduled for 6 September 2011.

## SOURCES

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