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Dear Sir

Strategic Review of Legal Aid in Scotland

The Crown Office and Procurator Fiscal Service (COPFS) welcomes this opportunity to contribute to the Independent Strategic Review of Legal Aid in Scotland.

Introduction

COPFS is Scotland's sole public prosecution service. Procurators Fiscal decide whether and what type of prosecutorial action, including the use of direct measures and prosecution in court, is required and conduct all prosecutions in the Justice of the Peace Court and the Sheriff Court. Crown Counsel, a group of senior prosecutors appointed directly by the Lord Advocate, instruct solemn cases, conduct all High Court prosecutions and appear for the Crown in the Appeal Court. All solemn cases are investigated and prepared by Procurators Fiscal and case investigators who work closely with the police and other reporting agencies.

The approach to prosecutorial decision making is set out in the COPFS Prosecution Code. Decisions are taken independently and on a principled basis, taking into account both legal and public interest considerations. Where proceedings in court are appropriate, they will be taken in the lowest court forum consistent with the nature of the offence and the anticipated sentence should the accused be convicted. Resolution of each case at the earliest opportunity is recognised to be in the interests of all concerned.

COPFS and SLAB have a strong tradition of partnership working and a shared experience of the role that legal aid can have in supporting successful reform of the justice system as a whole. Examples include the Scottish Government's Summary Justice Reform programme in 2008, the implementation this year of the Bowen reforms to sheriff and jury procedure and SLAB's strong support of the Scottish Government's Digital Justice Strategy. SLAB's position as a committed and key member of the Justice Board also reflects the strategic influence that a system of publicly funded legal aid has within the broader justice system.

The current system of criminal legal aid, both for summary and solemn cases, focusses correctly on the need to provide access to legal advice and services for those who would otherwise be unable to afford it. The effective, professional and appropriate defence of those accused of crime supports the sound administration of justice, safeguards fairness and is underpinned by fundamental rights.

Against that background, this submission is intended to inform consideration of the four broad questions posed in the call for evidence, questions that address how the current legal aid system impacts on the work, fairness and effectiveness of the whole criminal justice system, while necessarily highlighting some particular issues from a prosecution perspective.

Early Resolution of Cases

Under the current summary system, approximately 52,000 allocated trial diets called in the Sheriff Court in 2015-16 but only 9,000 proceeded to trial with evidence being led. In the same year, in the Justice of the Peace Court, approximately 20,000 trials called but only 3,000 proceeded[1]. These figures are broadly representative of the summary court system over a number of years and demonstrate that, in the Sheriff Court, for every five cases which are fully prepared for trial, including the obtaining and disclosure of evidence and the citing of witnesses, approximately only one case proceeds to trial. The proportion is obviously much lower in the Justice of the Peace Court.

It is clear on the basis of these figures that many thousands of cases which are prepared for trial do not lead to a trial but to the accused accepting a degree of criminal responsibility at the end of the trial preparation process or at an earlier stage after the case has been fully prepared for trial[2]. There are, of course, many complex reasons why the system operates in this fashion, including some historical cultural practices and human nature. There is some limited utilisation benefit for court time and for witnesses not giving evidence, but there can be no doubt that this practice contributes to the significant cost of churn in the summary courts and requires of witnesses to accept that it will be many months after the start of the criminal case before they know whether they will need to give evidence in court.

While recognising and supporting strongly the fundamental principles of the presumption of innocence and the prosecution's burden of establishing the guilt of a person accused of a crime, the Crown's position is that there is considerable scope to improve the efficiency of the courts by bringing forward in time the point at which cases are resolved by way of a guilty plea. The court itself recognises this point through the impact of sentencing by reducing sentences where the accused's guilty plea achieves a wider utilitarian benefit. Indeed, the court has explicitly set out clearly that the stage of the case at which the accused accepts responsibility determines the extent to which a discount is appropriate. Lord Gill, as Lord Justice Clerk in 2006[3], set out the Appeal Court's view on the matter:

> *"If an accused person has committed the crime charged, he can plead guilty to it at the outset and benefit from his plea by way of discount when the sentence is assessed; or he can defer pleading until he is sure that the Crown have a*

[1] !Evidence and Procedure Review – A New Model for Summary Criminal Court Procedure", SCTS, February 2017
[2] In 2015-16, approximately 15,000 Sheriff Court cases were disposed of at the scheduled trial by a plea of guilt and an additional 9,900 were similarly disposed of at the earlier intermediate diet.
[3] HM Advocate v Thomson [2006] HCJAC 32; 2006 SCCR 265, repeated by him in the case of Gemmell v HM Advocate [2011] HCJAC 129; 2012 SCCR 176

corroborated case, in the knowledge that a sentence discount may be reduced or refused altogether. That is the choice that he must make. He cannot have it both ways."

It should be stressed that the Crown, in putting forward this, does not seek in any way to frustrate the rights of accused who wish to put the Crown to the proof. Rather, it is the Crown's position that the system would be better able to schedule and conduct such trials if the majority of cases which resolve without a trial were dealt with at an earlier stage. In other words, the Crown is not seeking to turn trials into guilty pleas but to dispose of guilty pleas at the outset.

The Crown invites the review to consider whether a reformed system of criminal legal aid could more directly and explicitly support the appropriate resolution of cases at the very earliest opportunity. While changes have already been made by SLAB to better align the system with the goal of resolving cases, most notably with changes to the fixed fee system in support of Summary Justice Reform in 2008, it remains the case that having two different systems of legal aid, referred to below, which apply depending on whether a summary case is resolved at the beginning or at a later stage in proceedings and have different eligibility tests complicates the issue and leads to unintended consequences in terms of the defence approach to resolving cases.

In addition to our later point about simplification and flexibility, the Crown would suggest that reform of legal aid offers an opportunity to promote explicitly the earlier resolution of cases by aligning payment to the work which is required to resolve cases at the earliest opportunity and appropriately incentivising decision making at each stage of the case.

Simplicity and Flexibility - ABWOR and Summary Criminal Legal Aid

It has been our experience over a number of years in working with SLAB that the complexity of the current system of criminal legal in which two separate summary schemes, ABWOR and Summary Criminal Legal Aid, with different eligibility tests, and different schemes for solemn legal aid in the Sheriff Court and High Court are set down in detail in primary legislation is a significant hindrance to the development of a modern system of legal aid which promotes a more effective criminal justice system. We would therefore recommend to the review that the system of legal aid for criminal cases should operate as one single scheme across all levels and provide SLAB with sufficient flexibility to make appropriate changes, allowing for the appropriate degree of ministerial and political review, without the need to change primary legislation.

Changing Legal Profession

The final point relates to the changing nature of the legal profession which provides criminal legal aid services in Scotland. The current legislation was enacted at a time when there was greater separation of representation in the Sheriff Court and the High Court of Justicary, before the Public Defence Solicitors Office was established and at a time when the demographic of those who provided criminal legal aid was very different. The advent of solicitor advocates with rights of audience in the High Court of Justiciary, the decrease in the number of firms which provide criminal legal aid and the limited number of trainees employed by criminal defence firms, many of which are smaller than other private practice firms, raise some very serious questions about the future provision of criminal legal aid in Scotland. We do not offer any view on how the

legal profession should structure itself in future to provide such a service but would strongly urge the review to ensure that its proposed reform of legal aid should take account of these challenges and ensure that the system of criminal legal aid is not tied too closely to any particular model of provision but is instead flexible enough to adapt as the legal profession continues to change.

Conclusion

We would be very happy to provide any further information required by the review or to discuss the issues which we have raised in more detail.

Yours faithfully

DAVID HARVIE
Crown Agent & Chief Executive