PE1712/A
Scottish Government submission of 7 January 2019

I am writing to provide the Public Petitions Committee with a response to petition PE1712: Soul and Conscience letters. I understand the Committee have written to the Crown Office and Procurator Fiscal Service ('COPFS') in similar terms.

The petitioner calls for a review of the use of 'soul and conscience' letters in criminal proceedings and asks the Scottish Government to produce guidance for the courts and GP practices on the use of these letters, including alternatives to court appearances if an accused person is deemed unfit to attend in person.

It might be helpful if I first clarify that a 'soul and conscience' letter is a medical certificate and/or a letter from a doctor explaining that someone is too unwell to go to court. The use of such letters is not a matter provided for in legislation, but rather through the powers of the court to regulate their own procedures. We understand that the way the court approaches consideration of such letters is that a medical certificate or letter produced to the effect that a person is unfit to attend court is not conclusive evidence of that fact. In every case it is for the court to decide, from the certificate and any other relevant circumstances, whether it is persuaded that the person concerned is unfit to attend and, if so, what the consequences of that should be. It would be a matter for the courts to consider whether, in light of their experience of the use of such letters, it would be helpful for guidance to be produced for doctors on relevant issues for consideration when determining if a person is too unwell to attend court.

As narrated in the SPICe briefing which accompanies the petition, decisions as to the postponement of a trial or other procedural hearing are a matter for the court, as are any decisions relating to the requirement for a person to attend a court hearing – witness or accused. Similarly, any decisions relating to the discontinuation of a criminal prosecution are a matter for the court and COPFS.

It would therefore not be appropriate for the Scottish Ministers to comment on, nor seek to produce guidance in relation to, the operational aspects of the work of either the Lord Advocate, in his capacity as head of the systems of criminal prosecution in Scotland, or members of the Judiciary. The independence of our courts and prosecutors is enshrined in statute to ensure the criminal justice system operates free from political interference.

The specific issue that appears to be of concern to the petitioner is the question of the circumstances in which a court may determine that an accused person is unfit to stand trial. It may be helpful to clarify that a soul and conscience letter <u>does not</u> establish that an accused cannot, at some point, stand trial. Should it accept such a letter, the court is able to discharge the jury, reserve to the prosecution the right to raise a new libel, and recommit the accused. Even where the accused is likely to be unfit for the foreseeable future the court may still discharge the jury, desert *pro loco et tempore* – that is, end proceedings for the time being – and reserve to the Crown the right to raise a fresh indictment. It may be helpful to the Committee to provide a brief overview of the law governing the position where an accused's permanent unfitness for trial is under consideration. I have outlined this in the annex to this letter.

Annex – unfitness for trial

Where a person is prosecuted for a criminal offence, there is a mechanism in the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") for the court to hold that a person is mentally or physically unfit to stand trial.

This follows an amendment to the 1995 Act by section 170 of the Criminal Justice and Licensing (Scotland) Act 2010, which created a new statutory plea of unfitness based on the mental or physical condition of an accused. A new section 53F was inserted into the 1995 Act, replacing the common law rule on insanity as a plea in bar of trial.

Section 53F sets out a general test for the statutory plea of unfitness for trial. The effect of the provision is that a person is deemed unfit for trial if the court concludes, on the balance of probabilities, that he/she cannot effectively participate in the proceedings because of his/her mental or physical condition. The Act lists various (illustrative) factors which the court must have regard to in determining the fitness of an accused to stand trial, as follows:

The ability of the person to:

- understand the nature of the charge,
- understand the requirement to tender a plea to the charge and the effect of such a plea,
- understand the purpose of, and follow the course of, the trial,
- understand the evidence that may be given against the person,
- instruct and otherwise communicate with the person's legal representative, and
- any other factor which the court considers relevant.

Where the court is satisfied that an accused person is incapable of participating effectively in a trial, having regard to these factors, and is therefore deemed unfit to stand trial, the court will discharge the trial diet (or in proceedings on indictment, the first diet or preliminary hearing depending upon the timing of the finding) and hold an Examination of Facts (EOF) in terms of section 54 and 55 of the 1995 Act (if the prosecution have not applied to the court to discontinue the case *pro loco et tempore* with the intent of re-raising proceedings when the accused is fit to stand trial.) The purpose of the EOF is to examine the available evidence in order to determine whether the person committed the alleged offence(s) and whether there are any grounds for acquitting him/her and, where the court concludes that the accused did commit the offence, to identify the appropriate disposal for the person.

This procedure allows the court to assess the evidence at a hearing where witnesses are examined under oath as if in a trial to determine whether the accused did in fact carry out the acts constituting the offence on the complaint (summary proceedings) or indictment (solemn proceedings). If the court finds that it is not established beyond reasonable doubt that the accused committed the offence(s), he/she will be acquitted. Where the court decides that a person did carry out the acts as alleged, the court will also consider whether on the balance of probabilities there are any grounds for acquittal, which includes insanity. Where there are no such grounds, the court will make a finding in this regard but it is not recorded as a conviction and the person is not "sentenced" to a criminal penalty. Rather, there are a range of disposals available to the court, which are laid out in section 57 of the 1995 Act. These include, for example, a Compulsion Order, which can authorise a person's detention in hospital; or a Supervision and Treatment Order, which involves treatment and supervision in the community.