

Witness Name: Stephen McGowan
Statement No.: 1
Exhibits: SMG/1 - INQ000316303 to
SMG/77 – INQ000316378
Dated: 20 November 2023

UK COVID-19 INQUIRY

WITNESS STATEMENT OF STEPHEN MCGOWAN

I provide this statement in response to a request under Rule 9(1) and (2) of the Inquiry Rules 2006 dated 23 February 2023.

I, Stephen McGowan, will say as follows: -

INTRODUCTION

1. My full name is Stephen Anthony McGowan. I was born on 5 October 1973. My address is c/o Crown Office, 25 Chambers Street, Edinburgh. I hold the degree of LLB(Hons) from the University of Strathclyde (1995) and the Diploma in Legal Practice from the University of Strathclyde (1996). I qualified as a Solicitor in Scotland in 1997. I am a member of the Law Society of Scotland. I was a member of the Law Society's Criminal Law Committee between 2011 and 2021 and have been a member of the Council of the Law Society since 2017.
2. In 1999, I joined the Crown Office and Procurator Fiscal Service (COPFS) as a Procurator Fiscal Depute. Since then I have held a number of different promoted posts in COPFS. In 2018 I was appointed Deputy Crown Agent, Local Court, responsible for the prosecution of crime in Scotland's Justice of the Peace and Sheriff courts. In 2021 I was appointed Deputy Crown Agent, Serious Casework. My responsibilities in that role included the prosecution of

High Court cases, the prosecution of Serious and Organised Crime, Appeals, Extradition and International Co-Operation, and the Scottish Fatalities Investigation Unit. In April 2023 I was appointed to my current role of Deputy Crown Agent, Civil Litigation and Public Inquiries, to oversee civil cases arising from our work and our involvement in public inquiries.

3. Other than the events covered in this statement, I have never given evidence to, or provided reports for, any other Inquiries or investigations concerning the Covid 19 pandemic.

STRUCTURE AND ROLE OF COPFS AND THE KEY INDIVIDUALS WITHIN IT

4. COPFS is Scotland's prosecution service and death investigation authority. The Lord Advocate is the ministerial head of COPFS, leading the system of criminal prosecutions and the investigation of deaths. She is assisted in her work by the Solicitor General for Scotland. Together, the Lord Advocate and Solicitor General are known as the Law Officers. The Law Officers set the strategic priorities, objectives and prosecution policy for COPFS.
5. The Lord Advocate is a Minister of the Scottish Government and is accountable to the Scottish Parliament, but her role as head of the systems of prosecution of crime and investigation of deaths in Scotland are functions exercised by her independently of other Scottish Ministers and of any other person. The duty to act independently in these matters long precedes, but is expressly set out in, statute (Scotland Act 1998 section 48(5)).
6. The Lord Advocate appoints Advocate Deputes, who are independent prosecutors who may be drawn from the ranks of the Scottish Bar, or Solicitor Advocates, to assist her where required in making decisions in criminal cases, prosecuting before the High Court, and in the investigation of deaths. The Law Officers and Advocate Deputes are collectively known as Crown Counsel.
7. In January 2020 the Lord Advocate was James Wolffe KC and the Solicitor General was Alison Di Rollo KC. In June 2021 James Wolffe KC and Alison Di Rollo KC demitted from office. On 22 June 2021 Dorothy Bain KC was

sworn in as Lord Advocate and Ruth Charteris KC was sworn in as Solicitor General.

8. The Crown Agent is the civil service head of COPFS and head of profession for Procurators Fiscal. He is the principal legal advisor to the Lord Advocate on prosecution matters and the Chief Executive of COPFS. The Crown Agent is accountable to the Law Officers for the delivery of efficient and effective prosecution of crime and investigation of deaths, in accordance with their priorities and prosecution policies. The Crown Agent is the Accountable Officer for COPFS and, as such, answerable to the Scottish Parliament for the regularity and propriety of COPFS' finance and the stewardship of public monies.
9. In January 2020 the Crown Agent was David Harvie. In September 2022 David Harvie resigned from COPFS, having been appointed Sheriff of Grampian, Highland and Islands at Inverness. John Logue has been interim Crown Agent since September 2022.
10. Procurators Fiscal are professional lawyers employed by COPFS. They prosecute in courts across Scotland, and work in specialist units, having been granted a commission to do so by the Lord Advocate.
11. COPFS is divided into three 'functions': Serious Casework, Local Court and Operational Support.
12. Prosecutors in Serious Casework investigate and prosecute cases that need special knowledge or experience. Examples include environmental crime, organised crime, and appeals. Serious Casework also includes High Court teams. The most serious crimes in Scotland are dealt with by the High Court. These include murder, sexual offences, and cold cases. Serious Casework is the function which deals with the investigation of deaths.
13. The Local Court function prosecutes cases in Justice of the Peace and Sheriff Courts. Local Court teams work in offices across Scotland. Offices are grouped into six Sheriffdoms: Glasgow and Strathkelvin; Grampian, Highland and Islands; Lothian and Borders; North Strathclyde; South Strathclyde,

Dumfries and Galloway; Tayside, Central and Fife. A specialist national team in Local Court makes initial decisions in all crimes reported to COPFS deemed appropriate for summary proceedings.

14. Teams in Operational Support complete essential business tasks. The function's work is divided into two areas: Policy and Engagement, which includes Media Relations and Corporate Communications; and the National Enquiry Point and Response and Information Unit which deal with telephone calls and correspondence from the public. The Business Services teams include Finance, Human Resources, and Information Services. In general, Policy and Engagement lead for COPFS on engagement with Scottish Government colleagues, including about proposed legislation.
15. Between January 2020 and April 2022 each of the three functions was headed by a Deputy Crown Agent. (There are now five Deputy Crown Agents: for High Court; Specialist Casework; Local Court, Operational Support and the temporary post of Deputy Crown Agent, Civil Litigation and Public Inquiries which I hold.)
16. In January 2020, Lindsey Miller was Deputy Crown Agent, Serious Casework; I was Deputy Crown Agent, Local Court; and John Logue was Deputy Crown Agent, Operational Support. In March 2021 these roles were rotated: I became Deputy Crown Agent, Serious Casework, John Logue became Deputy Crown Agent, Local Court and Lindsey Miller became Deputy Crown Agent, Operational Support. In February 2022 Lindsey Miller began a secondment to the Home Office. Anthony McGeehan was appointed Deputy Crown Agent, Operational Support on a temporary basis. Prior to this (and from January 2020) Anthony McGeehan had been Procurator Fiscal, Policy and Engagement. Anthony McGeehan resigned from COPFS in September 2023, having been appointed Sheriff of North Strathclyde at Greenock.
17. The COPFS senior management structure in May 2021 is captured in an organogram (SMG/1 - INQ000316303). This shows the basic structure in place during the period January 2020 to April 2022, albeit there were changes in personnel during this period. The organogram produced in July 2022

(SMG/2 - INQ000316314) shows the same structure but reflects the changes in personnel that took place in February 2022. The current COPFS senior structure is shown in an organogram dated September 2023 (SMG/3 – INQ000316325).

THE WORK OF COPFS

Criminal cases

18. The roles of the Lord Advocate and Procurator Fiscal are hundreds of years old, predating the establishment of a police force in Scotland. The responsibility of the prosecutor to investigate crime; the power of the prosecutor to direct the police in the investigation of crime; and this power being exclusive to the prosecutor; is enshrined in the common law of Scotland. That the two functions of the prosecutor and the police are quite distinct is also recognised in the common law, with the police as investigators subject to the supervision and direction of the prosecutor, obliged to put before the prosecutor all material that may be relevant to the investigation of a particular offence. In recent years, these duties have been put on a statutory footing.
19. In practice, most criminal investigations will start with the police who almost always act on their own initiative. The police have discretion as to whether to investigate an alleged crime. The resources applied to any investigation are a matter for the police to consider. In general, where they consider there is sufficient evidence that a crime has been committed by a particular person, it is their duty to report on their investigation to the Procurator Fiscal by means of submitting a Standard Prosecution Report (SPR) and to act upon the instructions of the Procurator Fiscal. In general, if the police consider that there is insufficient evidence of a crime being committed, they will not make a report to the Procurator Fiscal. In some instances, particularly in more serious cases, where police are not sure there is sufficient evidence that a crime had been committed, they may report the matter to the Procurator Fiscal for advice and direction.

20. In cases of homicide or suspected homicide, the Procurator Fiscal is called immediately by the police and is able to exercise direction from the earliest stages in the inquiry.
21. It should be noted that the police have the option not to report minor offences to the Procurator Fiscal. They retain discretion to take no formal action in relation to minor offending behaviour where that is an appropriate response. This is of particular relevance in relation to Covid-19 regulations and related breaches, discussed further below. Police officers should consider in each case what action is most appropriate in the context of the offence. Police Officers should consider whether the use of a recorded police warning, in accordance with the Lord Advocate's Guidelines on the Operation of the Recorded Police Warning System for Adult Offenders (SMG/4 – INQ000316336), or an antisocial behaviour fixed penalty notice, in accordance with the Lord Advocate's Guidelines to Chief Constables on the Operation of the Fixed Penalty Notice Scheme under The Antisocial Behaviour (Scotland) Act 2004 (SMG/5 – INQ000316348), is appropriate to deal with the offending behaviour. Where a person is involved in repeat offending, any previous police or prosecutorial action should be considered in deciding whether an escalated response, whether involving police action or reporting to the Procurator Fiscal, is appropriate.
22. The Procurator Fiscal considers the SPR and makes a decision about whether it discloses sufficient evidence in law that a crime has been committed and that it has been committed by the accused person reported. Where there is sufficient evidence in law, they must decide whether prosecutorial action is in the public interest and the appropriate action. The Procurator Fiscal may decide to take no action, to offer an accused person an alternative to prosecution, such as paying a "Fiscal Fine"; or to prosecute. In some circumstances further police enquiry is necessary prior to making a decision.
23. Prosecutions on indictment – the more serious of cases - are brought in the name of the Lord Advocate, and summary proceedings run in the name of the Procurator Fiscal with responsibility for the Sheriffdom where the alleged crime

took place. Where proceedings on indictment before the Sheriff Court or the High Court are contemplated, the Procurator Fiscal will carry out their own inquiry and may give direction to the police to carry out further work. All cases in which the Procurator Fiscal recommends proceedings on indictment must be reported for Crown Counsel's instruction.

24. The Lord Advocate is also entitled to issue instructions to the police about the manner of reporting offences to prosecutors and these instructions must be complied with. An example of this is the Lord Advocate's Guideline on liberation by the police (discussed further below).
25. This structure recognises the expertise of the police in investigating crime, the responsibility of prosecutors in respect of the investigation of crime, and the independence of prosecutorial decision-making.

Deaths cases

26. As Scotland's death investigation authority COPFS investigates all sudden, suspicious, or unexplained deaths that occur in Scotland. The purpose of a death investigation is to identify the cause of death; eliminate the risk of undetected homicide; to eradicate dangers to life and the health and safety of the public; to allay public anxiety; to assist in the maintenance of accurate statistics; to secure and preserve evidence; and to satisfy domestic and international obligations in relation to the preservation of the right to life. In this capacity COPFS performs a function broadly similar to the Coronial system elsewhere in the UK, although the way in which this broad function is discharged is very different to other UK jurisdictions.
27. In general, deaths are reported to the Scottish Fatalities Investigation Unit (SFIU) of COPFS by the police; or by doctors who have attended a deceased person and have decided that they cannot issue a death certificate, or that the death falls into one of the categories that requires to be reported to the Procurator Fiscal. COPFS has published guidance to the medical profession about reporting deaths to the Procurator Fiscal in Reporting deaths to the

Procurator Fiscal – Information and Guidance for Medical Practitioners (SMG/6 – INQ000316359).

28. Many deaths reported require limited investigation: for example, the Procurator Fiscal may instruct a post mortem examination of the deceased following which a cause of death is certified and he may be satisfied that there are no concerns that require to be explored further.
29. A small number of deaths require, often significant, further investigation to determine whether the death has involved any criminality; or whether the death has occurred in circumstances where the Procurator Fiscal is required, or has discretion, to instruct a Fatal Accident Inquiry (FAI). The Procurator Fiscal has a duty to investigate and arrange for the holding of an FAI into all deaths occurring in Scotland that result from an accident in the course of the deceased's employment or occupation and all deaths occurring while the deceased was in legal custody (Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 section 2(3) and (4)). The Lord Advocate has discretion to instruct the holding of an FAI where she considers that the death was sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern, and that it is in the public interest for an inquiry to be held into the circumstances of the death (2016 Act, section 4). All decisions as to whether to instruct an FAI are taken by Crown Counsel.
30. The total number of active death investigations across COPFS as at 10 November 2023 was 10,238. This includes all deaths across SFIU, Homicide and other specialist units. This includes all open deaths cases from the date of receipt of death report.

COPFS AND DECISION-MAKING IN RESPONSE TO THE COVID-19 PANDEMIC

Liaison with Scottish Government in relation to Covid-19 legislation

31. In consequence of the roles of the Law Officers and COPFS I have outlined, and in keeping with the constitutional independence of these roles, COPFS were not involved in the core political and administrative decision-making in response to the Covid-19 pandemic or in relation to decisions that were taken

by the First Minister of Scotland, the Scottish Cabinet or by the Scottish Parliament.

32. COPFS did not propose or enact public health or Covid-19 legislation or regulations. The decisions to propose or enact such legislation were taken by the Scottish Parliament, having been proposed by the Scottish Government.
33. The Law Officers, as the senior legal advisers to the Scottish Government, may have been involved in core political and administrative decision-making and in decisions beyond those of which COPFS are aware. Questions in relation to their role in those decisions are best directed to the Scottish Government.
34. The Lord Advocate spoke publicly and addressed the Scottish Parliament about the operation of the criminal justice system during the pandemic. On 19 March 2020 the Lord Advocate and Chief Constable made a joint statement (SMG/7 – INQ000316370) making clear their commitment to keeping people safe from harm and dealing effectively with those who break the law. On 24 March 2020 the Lord Advocate made a statement about this to the Scottish Parliament (SMG/8 – INQ000316379). On 20 May 2020 the Lord Advocate wrote to the Convenor of the Justice Committee (SMG/9 - INQ000316380) to update the Committee on the impact of Covid-19 for his responsibilities in relation to the prosecution of crime and investigation of deaths.
35. As part of the development of the emergency legislation, the Scottish Government consulted with COPFS, and with Law Officers, and sought advice from Law Officers, in their roles as heads of the system of criminal investigation and prosecution, where relevant. This reflects standard Scottish Government practice of consulting with COPFS and Law Officers in relation to the operational practicality of relevant legislative provisions from a prosecutorial perspective. Where relevant, the Scottish Government then reflected the COPFS consultation response in the accompanying legislative Policy memorandum provided to the Scottish Parliament.

36. The exchanges between the Scottish Government, Law Officers and COPFS about the legislation related to matters of operational practicality of legislation including the enforceability of offences committed in private spaces including private homes and powers of entry to private spaces; the enforceability of offences directed to businesses; and the number of exceptions to travel restrictions. pandemic and about what was required to maintain the operation of the criminal justice system and the administration of justice. The Coronavirus (Scotland) Act 2020 (2020 Act) and Coronavirus (Scotland) (No.2) Act 2020 introduced a number of provisions concerning the operation of the criminal justice system.
37. COPFS also engaged with the Scottish Government on legislation that related to the practical operation of the criminal justice system during the pandemic and about what was required to maintain the operation of the criminal justice system and the administration of justice. The Coronavirus (Scotland) Act 2020 (2020 Act) and Coronavirus (Scotland) (No.2) Act 2020 introduced a number of provisions concerning the operation of the criminal justice system.
38. The Coronavirus (Scotland) Act 2020 made provision for inter alia:
- electronic signature and electronic transmission of documents which are required by law to be given to a person in connection with any civil or criminal proceedings before a court (Schedule 4, Part 1, Paragraph 1);
 - the court to issue a direction dis-applying the requirement for a person to physically attend court if their attendance by electronic means would not: prejudice the fairness of proceedings or otherwise be contrary to the interests of justice (Schedule 4, Part 1, Paragraphs 2-4);
 - any Sheriff Court, and any Sheriff, to exercise jurisdiction in the first calling of criminal proceedings from custody, regardless of where the offence(s) occurred and authority to a Procurator Fiscal, holding a commission for a particular Sheriff court district, to hear all cases calling under these provisions in that court (Schedule 4, Part 3);
 - the revalorisation of Fiscal Fines Schedule 4, Part 2, Paragraph 7)

- amendment of various time limits in the Criminal Procedure (Scotland) Act 1995 including solemn bail and custody time bars and summary custody time bar (Schedule 4, Part 4)

39. As a prosecution service, COPFS has the power to take direct prosecutorial action as an alternative to initiating criminal proceedings. Direct measures are among a range of prosecutorial options available to the prosecutor. Assuming that there is sufficient evidence in law to justify prosecutorial action, the prosecutor's decision as to which of those options should apply in any particular case will be taken, on the basis of the particular circumstances of the case, by reference to the considerations set out in the Scottish Prosecution Code (SMG/10 – INQ000316304) In cases where they are offered, direct measures represent a proportionate response to the offending behaviour.

40. The alternatives to prosecution available to COPFS include offering accused persons the opportunity to pay Fiscal Fines (a conditional offer of a fixed penalty under section 302 of the Criminal Procedure (Scotland) Act 1995). The maximum Fiscal Fine which may be offered was increased to £300 by the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and remained at that level until the maximum was increased to £500 by the 2020 Act.

41. This was the only revised direct power provided to COPFS under the Covid-19 legislation. The Coronavirus (Scotland) Act 2020 revalorised the Fiscal Fine scale as follows:

Level	Previous Amount	Updated Amount
1	£50	£50
2	£75	£125
3	£100	£175
4	£150	£250
5	£200	£325
6	£250	£400
7	£300	£500

42. The 2020 Act received Royal Assent on 6 April 2020. On the same date COPFS Policy officials provided advice to the Lord Advocate about issuing guidance to prosecutors regarding the revalorised Fiscal Fine levels and a proposed revised prosecution policy approach to Fiscal Fines and Fixed Penalty Road Traffic offences. The Lord Advocate approved the guidance which was published in the COPFS intranet as Operational Instruction 7 of 2020 (SMG/11 – INQ000316305). Case marking instructions for specific common law and statutory offences were reviewed and amended in light of the revalorisation of Fiscal Fines.
43. On 15 May 2020 the Convenor of the Justice Committee of the Scottish Parliament wrote to the Lord Advocate about the revalorising of Fiscal Fines and data for the use of Fiscal Fines (SMG/12 – INQ000316306). On 8 June 2020 the Lord Advocate replied to this letter (SMG/13 – INQ000316307), providing data for the early months of the pandemic. The Lord Advocate said that COPFS would continue to review the data and undertook to provide to the Committee regular updates on the operation of Fiscal Fines under the 2020 Act. Correspondence from the Lord Advocate to the Committee about Fiscal Fines continued until May 2023 (SMG/14 – INQ000316308 to SMG/26 – INQ000316321). I understand that a further update will be sent to the Committee shortly.
44. In addition to this ministerial correspondence, COPFS officials provided to the Scottish Government on a bimonthly basis during the pandemic and until 1 September 2022 COPFS management information on first substantive case marking decisions to take direct measures. This information shows cases marked for Fiscal Fines and the data is broken down into offers of Fiscal Fine at the seven available levels; as well as cases marked for combined offers of Fiscal Fines plus Compensation. The data covers financial years 2019/2020, 2020/2021, 2021/2022 and 1 April to 31 August 2022 (SMG/27 – INQ000316322).

45. The Coronavirus (Scotland) (No.2) Act 2020 made provision for inter alia amendment of various time limits within the Criminal Procedure (Scotland) Act 1995. Guidance was issued to prosecutors on the impact of this legislation, particularly in respect of time limits (SMG/28 – INQ000316323).
46. Following the pandemic COPFS has engaged with the Scottish Government about the amendments to the operation of the justice system that require to be retained to maintain the operation of the criminal justice system and the administration of justice. In September 2022 further guidance (SMG/29 – INQ000316324) was provided to prosecutors when revalorised Fiscal Fines were retained by the Coronavirus (Recovery and Reform) (Scotland) Act 2022, and the Fiscal Fine scale was adjusted.

Criminal Justice Board

47. I have been asked to provide a chronology of the dates of any meetings to which COPFS were invited with any committees, working groups, specialist bodies and other decision-making bodies formed by the UK and Scottish Government, specifically relevant to the pandemic including:
- COBR
 - Ministerial Implementation Groups
 - Covid-O Committee
 - Covid-S Committee
 - Four Nations Groups including regular Ministerial meetings chaired by the Chancellor of the Duchy of Lancaster
 - The Scottish Government Covid 19 Advisory Group and its sub-committees
48. COPFS did not attend the meetings of the groups listed above. The analogous meeting absent from this list is the Scottish Government Resilience Room (SGoRR). COPFS Policy officials attended SGoRR meetings for general awareness and to provide input where required on matters within the remit of COPFS. SGoRR situational reports and analytical data was shared with COPFS. Any request for the records and meetings of this group should be

made to Scottish Government as the group was established by Scottish Government.

49. Prior to the pandemic the Scottish Government coordinated a Justice Board on which were represented key stakeholders in the field of criminal and civil justice to discuss and address strategic issues for these systems. The Justice Board is still convened and meets monthly. COPFS is represented on the Justice Board. Any request for the terms of reference for the Justice Board, a schedule of meetings and attendees and Board papers should be directed to the Scottish Government as secretariat for the Board.
50. At the onset of the pandemic the Scottish Government established and coordinated a Criminal Justice Board to discuss and address the issues facing the criminal justice system specifically, the criminal justice response to the Covid-19 pandemic and how the system should recover from the pandemic and be renewed and transformed. The Criminal Justice Board continues to meet on a bimonthly basis. COPFS is represented on the Criminal Justice Board. Any request for the terms of reference for the Criminal Justice Board and a schedule of meetings and attendees should be directed to the Scottish Government.
51. One of the first key tasks for the Criminal Justice Board was to consider how criminal justice could continue to be delivered during the pandemic with regard to the public health advice and regulations and the effective closure of courts for all but essential criminal business.
52. On 8 August 2020 the Criminal Justice Board produced an analysis of the impact of Covid-19 on the criminal justice system (SMG/30 – INQ000316326). COPFS contributed to the development of this document. The purpose of the document was to provide to the Cabinet Secretary for Justice, on behalf of the Criminal Justice Board, an analysis of:
 - the impact of the Covid-19 pandemic on the criminal justice system in Scotland;

- the increased criminal case and community disposal workload caused by the closure of courts and its impact on all parts of the criminal justice system, including the prison population;
- the options available to the Minister to restore the system to the March 2020 position, address the backlog of cases which had built up and the lack of capacity to manage custodial and community disposals, and lay the foundations for future improvements.

53. This analysis formed the basis of subsequent business cases for ministerial approval to fund additional trial capacity to address the trial backlog in criminal courts and to address the consequences for custodial and community disposals.

COPFS guidance in relation to Covid-19

54. The role of COPFS was to provide Lord Advocate's Guidelines to the police, and prosecution policy guidance to prosecutors, functions which are uniquely those of the Lord Advocate and which are not part of the political or administrative decision-making functions of the Scottish Government.
55. COPFS published on its intranet, now called Connect, a suite of prosecution policy and guidance to staff in relation to the Covid-19 pandemic. The different items of guidance were published in the relevant area of the intranet. For ease of reference, all of the Covid-19 prosecution policy and guidance was brought together and able to be accessed from one page on Connect. This guidance included guidance issued to the police; guidance to staff on practical, technical, and employment matters; general prosecution policy on matters such as bail; and offence-specific guidance.

Guidance to the police

56. I have been asked to provide a description of the role of COPFS in the giving guidance to the Chief Constable.

57. The Lord Advocate has always had an ability to direct the police in their investigations and to provide the Chief Constable with guidance on the reporting of cases. This constitutional role is now set out in statute. Section 12 of the Criminal Procedure (Scotland) Act 1995 provides that the Lord Advocate may, from time to time, issue instructions to the Chief Constable with regard to the reporting, for consideration of the question of prosecution, of offences alleged to have been committed. Section 17(3) of the Police and Fire Reform (Scotland) Act 2012 sets out the corresponding duty on the Chief Constable when directing police officers to comply with any lawful instruction given by the Lord Advocate or Procurator Fiscal.
58. Notwithstanding this, it is important to note that the Police Service of Scotland is an independent organisation. The Chief Constable is responsible for the policing of Scotland and in particular has direction and control of the Police Service and is responsible for its day to day administration and allocation of resources (2012 Act, section 17(1) and (2)). Questions on the role in the pandemic of the police, beyond the guidance issued to the Chief Constable by the Lord Advocate, are best directed to them.

Lord Advocate's Guideline to the police on liberation

59. At the start of the pandemic there existed a Lord Advocate's Guideline to the police on liberation of persons arrested and charged by them (SMG/31 – INQ000316327). This guideline was revised at the onset of the public health emergency. Following discussion with the police, between 18 and 19 March 2020 COPFS Policy officials provided advice to the then Lord Advocate on an amended Guideline and on related, amended guidance to prosecutors on bail, in light of the significant ongoing and future disruption across the criminal justice system as a result of the pandemic.
60. On 20 March 2020 the Lord Advocate instructed that a revised Guideline should be issued. The key points from the revised Guideline (SMG/32 – INQ000316328) were that:

- The test to be applied where considering whether it is appropriate to keep an individual in custody was whether there was a substantial risk to a victim, witness or the public which cannot be mitigated by bail conditions. Cases which are not likely to result in solemn proceedings and/or do not involve vulnerable victims or witnesses were less likely to be appropriate to be commenced from custody;
- There was a need for particular care in decision-making on liberation from custody in domestic abuse cases;
- It would not be appropriate to keep an individual in custody for the sole reason that they were of no fixed abode. The police should take all necessary steps to identify an address for the individual.
- The same test is to be applied to all people arrested including those arrested on warrants and those who breach investigative liberation or undertaking conditions, recognising that the risk of absconding or failure to appear could be given lower priority than in normal circumstances. Previously if someone was arrested on a warrant they would only be released in exceptional circumstances.

61. On 20 March 2020 the Lord Advocate minuted the First Minister (SMG/33 INQ000316329) advising her of the amended guidance issued.
62. The terms of the Guideline were kept under review by COPFS during the pandemic and there was dialogue with the police, the Scottish Court and Tribunal Service, other criminal justice partners and Scottish Government about matters covered by the Guideline and the operation of the Guideline.
63. On 30 March 2020 an amended Guideline was published (SMG/34 – INQ000316330). The police may release persons from police custody on undertaking to appear at a specified court at a specified time and to comply with conditions imposed while subject to the undertaking (Criminal Justice (Scotland) Act 2016 section 26(1) and (2)). The revised Guidelines allowed for accused persons in all cases to be released on undertaking for 90 days. The timescales in the earlier Guideline were 14 days for domestic abuse cases and 28 days for other cases. There were two main reasons why the decision was

taken to extend the time for undertakings in the revised Guideline. Firstly, there were concerns about the ability of accused persons to answer undertakings whilst adhering to public health advice. All but 10 “hub” Sheriff courts in Scotland had closed. Travelling long distances, particularly on public transport, was not in keeping with public health advice. Secondly, there were concerns that, if an accused person failed to attend court to answer an undertaking, sheriffs may refuse to grant a failure to appear warrant, and undertaking conditions to which accused persons had to adhere would expire leaving vulnerable complainers unprotected. It was also recognised that an increase in persons released on short undertakings would put pressure on courts to find slots for persons to appear within that period.

64. To address the concern identified of undertakings expiring if accused failed to appear at court, Policy officials approached the Scottish Government to request a legislative solution. This was subsequently provided for in Schedule 2, Part 1, Paragraph 6 of the emergency Coronavirus (Scotland) (No. 2) Act 2020. The Act inserted a new section 29A into the Criminal Justice (Scotland) Act 2016, enabling the court to modify the undertaking date where the sheriff considered the reason for the accused’s non-appearance at undertaking was due to Covid-19 and was unwilling to grant a warrant. This ensured that the undertaking did not expire and the conditions, including any protective conditions for victims, remained in force.
65. During the passage of the legislation, concerns were raised by Rona Mackay MSP about the extended timescales and the lack of differentiation in the revised provisions in the timescales for undertakings in domestic abuse cases (this is recorded in the official record of the debate in the Scottish Parliament on 13 May 2020 – SMG/35 – INQ000316331). COPFS officials advised Scottish Government that the Guideline, and in particular the timescales, would be reviewed after a period of approximately 3 months. Concerns that the revised Guideline had the effect of transferring risk to victims, primarily women, and children, were also raised by victim stakeholders. In particular concerns were expressed about perceived significant increases in breaches of undertakings.

66. As a result of concerns raised, Police Scotland carried out a review and put in place bespoke training with Custody Division Inspectors to ensure officers applied the Guideline correctly and understand the risk and safety considerations, especially in domestic abuse cases. Following that training, the police confirmed there had been a change in approach with domestic abuse undertakings decreasing significantly, and an increased use of custody reporting. This was supported by COPFS management information which showed a significant increase in liberation of accused persons in domestic abuse cases on undertaking in April 2020 and this number decreasing by June 2020 although the numbers of domestic abuse undertakings were still more than double the rates for the same period in 2019.
67. COPFS officials also considered data in relation to cases reported with either an aggravator of committing an offence whilst subject to an undertaking condition or a statutory charge under the Criminal Justice (Scotland) Act 2016 Schedule 1 s.1 (1) (c) of failing to comply with the terms of an undertaking. This showed that 749 cases were reported containing 1651 charges for a 7-week period between April and June 2020, compared with 122 cases with 228 charges for the equivalent period in 2019. Of the 749 cases in 2020, 173 (23%) contained at least one charge with a domestic abuse identifier.
68. Having reviewed the situation, and taken account of the concerns of stakeholders and the data set out above; the improvement in the public health situation; and the fact that all Sheriff courts had reopened to deal with custody and undertaking business, Policy officials considered there was a compelling case for reviewing the Guideline to revise the timescales for dealing with undertaking cases to those which applied pre-Covid-19. On 8 July 2020 officials provided advice to the Lord Advocate on this basis.
69. The Lord Advocate accepted this advice, and the revised guideline (SMG/36 – INQ000316332) was published in July 2020, as was guidance to prosecutors on undertakings (SMG/37 – INQ000316333).
70. It was considered that wider revision of the Guideline was premature at that stage, especially given the potential for a second wave/spikes of Covid-19.

71. On 15 September 2020 COPFS officials provided to the Lord Advocate data on reported breaches of undertakings and bail since lockdown. The Lord Advocate was advised that there had been a dramatic increase in breach of undertaking charges and undertaking aggravations reported with offence dates between 23 March and 31 July 2020, compared to the same period in 2019. There had been a much smaller, but still substantial, increase in breach of bail charges and bail aggravations. Having considered this information the Lord Advocate requested that officials provide him with further advice, particularly about whether there were steps he could take to address this and whether he ought to make the Cabinet Secretary for Justice aware of the data.
72. On 30 September 2020 HM Chief Inspector of Prosecution and HM Inspector of Constabulary published a report of their joint inspection of certain emergency criminal justice measures (SMG/38 – INQ000316334). I address this report further below. The inspectors noted that the revised Guideline had had a positive impact on custody decision making, not strictly because of the content of the Guideline, but rather because they prompted a cultural change in police custody decision-making. There was a reduction in cases reported from custody and a significant increase in the use of liberating accused persons on undertakings to appear at court on a later date, though practices appeared to be reverting to pre-Covid patterns. It was noted that there remain questions about custody decision-making, and it was suggested there was a need for police and COPFS to work together on this.
73. On 5 October 2020 Policy officials provided advice to the Lord Advocate. It was noted that despite the revised Guideline issued in July 2020 confirming that undertaking timescales should revert to the pre-Covid timescales, compliance with this had been inconsistent because there were insufficient court slots in many courts across Scotland to enable the police to comply with the 14/28 days timescales set out in the Guideline. Police Scotland had provided data for people released on undertaking during the last week of August 2020 which showed that while the average undertaking time period in a domestic abuse case across the country was 15 days, and 33 days for non-domestic abuse undertakings, there were significant numbers of cases which

far exceeded these timescales. In domestic abuse undertakings, 56% of them were fixed for timescales out with the 14-day period, with the longest time period being 114 days; and for non-domestic abuse undertakings, 46% were fixed out with the 28-day period with the longest time period being 115 days.

74. It was recommended that:

- the Lord Advocate wrote to the Cabinet Secretary for Justice to advise him of the data on numbers of undertakings and numbers of cases of breaches of conditions. The Lord Advocate wrote to the Cabinet Secretary for Justice on 29 October 2020 (SMG/39 – INQ000316335).
- in addition to liaison that had already been carried out at Sheriffdom level, a senior COPFS official write to a senior SCTS representative to highlight the situation at a national level and impress upon them the need to resolve this situation as a matter of urgency so that the Guideline can properly be complied with. COPFS officials liaised with senior police officers and senior SCTS officials about this matter.
- COPFS initiate a review of the revised Guideline and COPFS policy guidance introduced at the start of the pandemic on undertakings and bail should be reviewed. In late 2020, consideration was given to reviewing the Guideline to reflect increased court capacity and operational feedback of concerns that Police Scotland were adopting too liberal an approach to liberation on undertaking following arrest on an apprehension warrant. The public health situation worsened in December 2020 leading to the second national lockdown and in light of this revision of the Guideline was paused.

75. By June 2021 the public health situation had improved, and the court estate had reopened fully. On 8 June 2021, having engaged with Police Scotland, Policy officials recommended to the Lord Advocate that the Guideline should be amended to broadly revert to the pre-Covid approach in relation to accused persons and witnesses arrested on apprehension warrants. The Guideline would contain a caveat that would permit a police officer to take account of “immediate pandemic-related circumstances”, in taking any decision. On 9

June 2021 the Lord Advocate approved the amended Guideline, and it was published on 10 June 2021 (SMG/40 – INQ000316337)

76. On 12 August 2021 the then Crown Agent met with the Chief Constable, Iain Livingstone. There was discussion about review of the Guideline. On 13 August 2021 the Crown Agent wrote to the Chief Constable (SMG/41 – INQ000316338). He said that the continuing improvement of the public health position and potential lifting of public health restrictions makes this a logical time to again review the LAGs. This review would be with a view to returning to the pre-pandemic LAGs. He invited the Chief Constable to nominate a lead officer to work with COPFS on the review. There followed substantial liaison between the police and COPFS Policy officials about the Guideline.
77. On 23 November 2022 Policy officials provided advice to the Lord Advocate, recommending a return to the principles of the Guideline that were in place prior to the pandemic. In producing a revised Guideline officials drew on learning since March 2020, to avoid reversing a change in police culture that placed more focus on the right to liberty. The reason for there being some months between the decision to review the Guideline and advice to the Lord Advocate on this was the emergence of the Omicron strain of Covid-19 and the worsening of the public health situation. The Lord Advocate approved the revised Guideline (SMG/42 – INQ000316339) which came into effect on 14 December 2022, and which is the current guidance to the police.

Lord Advocates Guidelines on Fixed Penalty Notice Scheme

78. Lord Advocate's Guidelines were issued on the Operation of the Fixed Penalty Notice Scheme under the Health Protection Coronavirus Regulations and there were various discussions with Scottish Government in relation this scheme.
79. At early stages of identifying the levels which would be imposed as part of the Coronavirus Regulations being introduced, there was discussion around whether the Scottish Government should adopt an approach consistent with

that adopted for England and Wales in terms of the level of fine; or should adopt a process consistent with the levels which were then in force for Antisocial Behaviour offences in Scotland. The Lord Advocate offered advice in that discussion that whilst it was ultimately a Scottish Government policy decision we should adopt the latter approach which was more straightforward for all the agencies involved. For example because documentation and systems existed which recognised those amounts. The Scottish Government ultimately decided to maintain consistency with England and Wales and adopt the approach proposed by them.

80. Thereafter, the Lord Advocate issued the Lord Advocate's Guidelines on the operation of the Fixed Penalty Notice Scheme under The Health Protection (Coronavirus) Regulations 2020 (SMG/43 – INQ000316340). This was published internally for prosecutors and for the police on the 30 March 2020. The Lord Advocate instructed that, in general, fixed penalty notices (FPNs) should be issued in respect of minor offences committed under regulations 8(1),(2) or (3) of the Health Protection (Restrictions) (Coronavirus)(Scotland) Regulations 2020.
81. The scheme for the FPNs under the regulations was a £60 fine for a first offence then doubling for subsequent offending up to a maximum of £960 so an individual would reach a fine of £960 on their fifth offence. At the time, the maximum level available as a Fiscal Fine which prosecutors could issue was £500 as provided by the Coronavirus (Scotland) Act 2020. The Guidelines explicitly restricted the police to issuing fines to an individual for 4 offences, taking someone to a maximum of a fine of £480, before being reported to COPFS for a fifth or subsequent offence.
82. On 31 March 2020 the Lord Advocate minuted the First Minister (SMG/44 – INQ000316341) to set out the key points for the guidance. The Lord Advocate did not address in this minute the reasoning behind the direction to the police to report individuals to the Procurator Fiscal for a fifth offence. The reasons were articulated later in discussions between COPFS Policy officials and other partners including Scottish Government officials. This was due to the fact that the maximum penalty could then offer as a Fiscal Fine was £500 and it seemed

inconsistent for the Police to be able to impose a FPN in excess of the fine available to the prosecutor. There was some subsequent discussion about whether the fine levels should be increased. The Lord Advocate indicated that he awaited any proposal in terms of fines but that the reporting of offences by the police would be a matter for him.

83. The Guidelines were updated in August 2021 (SMG/45 – INQ000316343) to reflect the coming into force of The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 on 9 August 2021, and amend the previous relevant Lord Advocate's Guidelines to permit the use of Fixed Penalty Notices in relation to offences under the 2021 Regulations.

General prosecution policy

Bail

84. Between 18 and 19 March 2020 COPFS Policy officials provided advice to the then Lord Advocate on amended guidance to prosecutors on bail. The thrust of this advice was that, where an accused person was reported in custody, either as a new case or having been arrested on a warrant, prosecutors should continue to oppose bail in those cases where there is a substantial risk to a victim, witness or the public which cannot be mitigated by imposition of proportionate bail conditions. Where a case was not a solemn case and/or did not involve vulnerable victims or witnesses it was less likely in the current circumstances to be appropriate to oppose bail. In domestic abuse cases in particular it may be more appropriate to oppose bail for an accused, given the particular risks associated with those cases.
85. On 20 March 2020 the Lord Advocate approved this guidance and the guidance was published on the COPFS intranet. The guidance was subsequently reviewed in light of the decision of the High Court in the case of *JD & BK v HM Advocate 2020 HCJAC 15*. In this case the High Court stated that, "In practical terms, bail ought not to be granted where: (1) the accused is

charged with a serious offence which, if he were to be convicted, is likely to attract a substantial custodial terms (e.g. one in excess of two years); and (2) the nature of his record, or other circumstances, indicate that, were he to be at liberty, he is likely to commit further violent (including sexual and domestic abuse) offences and/or is likely to attempt to obstruct justice (including approaching witnesses).” The revised guidance (SMG/46 – INQ000316344) made reference to this case and provided guidance to prosecutors on the decision to appeal the granting of bail in solemn cases.

Prosecution

86. I have been asked to describe the role of COPFS in prosecuting offences under the Covid-19 regulations including the Coronavirus (Scotland) Act 2020, the Coronavirus (Scotland) (No.2) Act 2020, Coronavirus (Extension and Expiry) (Scotland) Act 2021 and the Coronavirus (Recovery and Reform) (Scotland) Act 2022.
87. I have also been asked to provide a chronology and description of all of the Covid-19 regulations enacted in relation to Scotland. As a prosecution service, COPFS did not propose or enact legislation. I consider that this question is better directed to the Scottish Government and/or the Scottish Parliament.
88. COPFS issued guidance to Procurators Fiscal as to how they should approach reports by the police alleging criminality in relation to the Covid-19 pandemic. This guidance sits within the suite of offence-specific guidance to prosecutors in Chapter 8 of the COPFS Case Marking Instructions. Guidance was published on allegations of breaches of Coronavirus regulations and other criminality related to the public health situation and restrictions, including common law offences. Operational Instructions contained guidance to prosecutors that was not offence-specific. Prosecutors access Case Marking Instructions (CMIs) and Operational Instructions (OIs) on the COPFS intranet, Connect. We consider that prosecutorial guidance is confidential. It is not published publicly.

89. Guidance to prosecutors on public order offences in the context of Covid-19 was issued on 30 March 2020. This recognised that Police Scotland would, where possible, engage, explain and encourage compliance with the public health restrictions prior to moving to enforcement. At the same time a robust prosecutorial response to serious incidents of public disorder which threaten public health or public safety was to be taken to help maintain public confidence and provide a deterrent to those considering committing such offences, particularly where they were being committed wilfully and deliberately in an attempt to avoid or frustrate restrictions being imposed by the UK and Scottish Governments. The guidance was amended at various points during the pandemic in response to the making of health protection regulations (SMG/47 – INQ000316345).
90. Guidance to prosecutors on the prosecution of coughing and spitting offences was issued in July 2020 (SMG/48 – INQ000316346). This guidance drew on information from the Chief Medical Officer's office about the transmission of Covid-19. In particular the guidance provided that there was a presumption that in the context of COVID 19 cases involving spitting or coughing or attempting to spit or cough on others will be marked for petition proceedings in the first instance and only reduced to summary in limited circumstances. There was reference to the case of *HMA v Lindsay [2020] HCJAC 26* which set out how seriously such offending would be taken by the Court.
91. Updated guidance to prosecutors on coughing and spitting offences was issued on 23 September 2023 (SMG/49 – INQ000316347) removing the presumption that, in the context of COVID-19, cases involving spitting or coughing or attempting to spit or cough on others will be marked for petition proceedings in the first instance. As there are no rules or restrictions in Scotland in relation to COVID-19 and it is no longer considered a global health emergency by the WHO, it was considered that the presumption of prosecution on petition for spitting and coughing offences should be reviewed. This change applies retrospectively to conduct alleged to have been committed after 21 March 2022 when COVID-19 restrictions were lifted in Scotland. Whether such a case is to be marked for petition proceedings,

and/or may be reduced to summary will depend on an assessment of the particular facts and circumstances of a case.

92. The following offence-specific case marking instructions were issued to prosecutors:

- Case Marking Instruction Offences committed by potentially infectious people, in terms of the Coronavirus Act 2020, Schedule 21 Part 3 Paragraph 45 (SMG/50 – INQ000316349)
- Case Marking Instruction Offences relating to events, gathering and premises, in terms of the Coronavirus Act 2020, Schedule 22 Part 3 Paragraph 20 (SMG/51 – INQ000316350);
- Case Marking Instruction Contravening a direction or failing to comply with a reasonable instruction or prohibition notice under the Coronavirus Regulations Regulation 8(1) Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (SMG52 – INQ000316351);
- Case Marking Instruction Obstructing a person carrying out a function under the Coronavirus Regulations Regulation 8(2) Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 and subsequent Regulations (SMG53 – INQ0003163520);
- Case Marking Instruction Contravening a direction or failing to comply with a reasonable instruction or prohibition notice under the Coronavirus Regulations Regulation 8(3) Health Protection (Coronavirus)(Restrictions)(Scotland) Regulations 2020 and subsequent Regulations (SMG54 – INQ000316353);
- Case Marking Instruction Failing to ensure that passengers arriving in Scotland were provided with the required information under the Health Protection (Coronavirus, Public Health Information for Passengers Travelling to Scotland) Reg 6(1) (SMG/55 – INQ000316354);
- Case Marking Instruction Breaching passenger information requirements Health Protection (Coronavirus)(International Travel)(Scotland) Regulations 2020 - Regulations 5(1) & 5(2) (SMG/56 – INQ000316355);

- Case Marking Instruction Breaching quarantine provisions Health Protection (Coronavirus)(International Travel)(Scotland) Regulations 2020 Regulations 9(1) and 9(3) (SMG/57 – INQ000316356);
- Case Marking Instruction Contravening a requirement in or imposed by the quarantine enforcement provisions of the Regulations Health Protection (Coronavirus)(International Travel)(Scotland) Regulations 2020 - Regulation 9(2) (SMG/58 – INQ000316357)
- Case Marking Instruction Obstructing a person carrying out a function under the Regulations Health Protection (Coronavirus)(International Travel)(Scotland) Regulations 2020 - Regulation 9(4) (SMG/59 – INQ000316358)
- Case Marking Instruction Contravening passenger information requirements The Health Protection (Coronavirus)(International Travel and Operator Liability)(Scotland) Regulations 2021 – Regulation 28 (SMG/60 – INQ000316360);
- Case Marking Instruction Contravening testing requirements The Health Protection (Coronavirus)(International Travel and Operator Liability)(Scotland) Regulations 2021 – Regulation 29 (SMG/61 – INQ000316361);
- Case Marking Instruction Contravening testing requirements The Health Protection (Coronavirus)(International Travel and Operator Liability)(Scotland) Regulations 2021 – Regulation 30 (SMG/62 – INQ000316362);
- Case Marking Instruction Contravening isolation requirements The Health Protection (Coronavirus)(International Travel and Operator Liability)(Scotland) Regulations 2021 – Regulation 31 (SMG/63 – INQ000316363);
- Case Marking Instruction Contravening self-isolation requirements The Health Protection (Coronavirus)(International Travel and Operator Liability)(Scotland) Regulations 2021 – Regulation 32 (SMG/64 – INQ000316364);
- Case Marking Instruction Breach of passenger information requirements - The Health Protection (Coronavirus)(International Travel and Operator Liability)(Scotland) Regulations 2021 – Regulation 45 (SMG/65 – INQ000316365);

- Case Marking Instruction Breach of operator requirements - The Health Protection (Coronavirus)(International Travel and Operator Liability)(Scotland) Regulations 2021 – Regulation 45(2) (SMG/66 – INQ000316366)

93. The attached data table (SMG/67 – INQ000316367) shows the prosecutorial action taken by COPFS in respect of charges under Coronavirus regulations reported by the police to COPFS between 1 April 2019 and 31 March 2023. This table also provides information about outcomes. A second table (SMG/68 – INQ000316368) shows the Coronavirus regulations charges reported and prosecuted, with data at the level of particular offences.
94. I have been asked to provide “details of those prosecuted, cautioned or subject to no further action broken down by race / ethnicity, age, sex and any other details related to protected characteristics under the Equality Act 2010”. A second table (SMG/69 – INQ000316369) provides a breakdown of data by sex and age group of accused person. We do not have data that we consider to be complete on the race and ethnicity of accused persons reported to us by the police. There is a field in our electronic case system for ethnicity, however our system is populated by information provided by the police. Ethnicity is not a mandatory field that must be completed by the police in order to report the case. It is not always completed by the police with the result that this information is not held by us electronically for all cases. We are therefore unable to run exercises to extract data in this category as the information is not complete.
95. It should be noted that this data pertains to statutory Coronavirus offences. COPFS also prosecuted individuals for common law offences committed that were directly related to the Covid-19 pandemic and the public health situation and requirements, for example culpable and reckless conduct in relation to travelling and mixing with others when knowingly infected with Covid-19; and offences of violence involving spitting. COPFS systems do not have a marker to identify such common law cases as related to Covid-19 so I am unable to

provide data for the numbers of common law offences reported to COPFS or the outcome of these cases.

96. I have been asked to provide the Inquiry with data on “the cost of charging and / or prosecuting individuals for breaching Covid-19 regulations”. COPFS does not hold data for the actual cost of prosecuting statutory and common law offences related to Covid-19, and processing cases marked for alternatives to prosecution or for no action.
97. I have considered carefully whether I can provide estimates of the average cost of prosecuting a Sheriff court summary case in which there was a trial in which evidence was led; or a Sheriff court solemn case in which there was a trial in which evidence was led. I do not consider that we hold data that is sufficiently reliable for such costs. In any event, I do not think such data would provide the Inquiry with a reasonable estimate of the costs to COPFS of prosecuting cases related to Covid-19. Trials took place in only a small number of cases reported with charges related to Covid-19. Summary and solemn cases prosecuted in the Sheriff court, and cases prosecuted in the High Court that have been identified in our data tables may have had as their focus more serious, non-Covid-19 related offences and were only incidentally connected to Covid-19. The cost of a case that proceeded to trial would not give the Inquiry an idea of the overall costs to COPFS of liaison with Scottish Government about legislating for criminal offences, formulating policy, and case marking and processing of cases marked for alternatives to prosecution.
98. SCTS is the official keeper of the court record and related data. Any request for further data on court case outcomes should be directed to SCTS.

Investigation of Covid-19-related deaths and trends in deaths reporting since the pandemic

99. During the Covid-19 pandemic COPFS liaised with the office of the Chief Medical Officer and other partners about the public health situation and the requirements for reporting deaths related to Covid-19 to the Procurator Fiscal. The Lord Advocate and COPFS communicated publicly and with the medical

profession about these requirements; and about how deaths related to Covid-19 would be investigated.

100. On 22 February 2020 the Scottish Government made regulations to make COVID-19 a Notifiable Disease. On 11 March 2020 the World Health Organisation declared a pandemic. In normal circumstances deaths attributable to notifiable infectious disease, which pose an acute and serious risk to public health, are one of the categories of death which would require to be reported to the Procurator Fiscal (paragraph 3(d) of the Reporting deaths to the Procurator Fiscal – Information and Guidance for Medical Practitioners). However, at the start of the pandemic the Lord Advocate instructed that Covid-19 (or presumed Covid-19) deaths did not require to be reported to COPFS unless there was another substantive reason for doing so. This was consistent with the approach which had been taken in Scotland previously in relation to other significant outbreaks of infectious disease. That dispensation recognised that one of the purposes of reporting such deaths to the Procurator Fiscal is to aid identification of a significant, emerging public health emergency but because a pandemic had already been declared, reporting such deaths for that specific purpose was not required. The dispensation also recognised that in most such cases, further investigation would not be necessary to establish the medical cause of death and was with a view to minimising the burden of reporting on the medical profession at a critical time in the pandemic.
101. On 24 March 2020 the Chief Medical Officer, the Crown Agent, the Registrar General for Scotland and Deputy Chief Constable wrote jointly to the medical profession (SMG/70 – INQ000316371). communicating the instruction of the Lord Advocate and advising that the position would be reviewed by the end of July 2020.
102. As the pandemic progressed, the Lord Advocate kept matters under review. On 13 May 2020 he made a statement to the Scottish Parliament (SMG/71 – INQ000316372) to advise that he had decided that two categories of Covid-19 (or presumed Covid-19) deaths should be reported to COPFS. The first of those categories was where the deceased may have contracted the virus in

the course of their employment or occupation. This might include the deaths of care home workers, front-line National Health Service staff, public transport employees and emergency service personnel. The second category was where the deceased was resident in a care home (including adults, the elderly and children) when the virus was contracted. On 20 May 2020 the Chief Medical Officer, the Crown Agent, the Registrar General for Scotland and Deputy Chief Constable wrote jointly to the medical profession (SMG/72 – INQ000316373) communicating the decision of the Lord Advocate; and that with effect from 9am on 21 May 2020, in light of significant public anxiety around deaths in care homes and deaths of those who may have contracted COVID in their place of work, any such deaths must be reported to the Procurator Fiscal by medical practitioners in terms of section 3(g) of the above guidance.

103. On 19 April 2022 the Chief Medical Officer, the Crown Agent, the Registrar General for Scotland and Deputy Chief Constable wrote again to the medical profession (SMG/73 – INQ000316374) to advise that the Lord Advocate had clarified the requirement for reporting a nosocomial, or hospital onset, Covid-19 death under section 3(g) of the above guidance (where the circumstances surrounding the death may cause public anxiety). Practitioners were advised that they should not report hospital or hospice nosocomial Covid-19 deaths under paragraph 3(g) if the only reason the circumstances surrounding the death may be said to cause public anxiety was because the person died of, or may have contracted, Covid-19 in hospital. Practitioners were reminded that there remained situations where certifying doctors did still require to report a death to the Procurator Fiscal, in particular where the death fell to be reported under another category defined by section 3(e) of the above guidance.
104. On 21 December 2022 the Chief Medical Officer, the Crown Agent, the Registrar General for Scotland and Deputy Chief Constable wrote again to the medical profession (SMG/74 – INQ000316375) to advise them that the Lord Advocate had decided that, with immediate effect, certifying doctors no longer required to report deaths associated with Covid-19 disease (or presumed COVID-19 disease) where the only reason for reporting the death to the

Procurator Fiscal was because of the instruction contained within Chief Medical Officer's letter dated 20 May 2020 i.e. that the virus was contracted whilst the deceased was resident in a care home, or where it may have been contracted whilst the deceased was in the course of their employment or occupation. Again practitioners were reminded that there would otherwise be situations where certifying doctors did still have to report a death due to Covid-19 (or presumed Covid-19) to the Procurator Fiscal, in particular where the death fell to be reported under another category defined by section 3 of the above guidance.

105. In order to receive and investigate reports of deaths related to Covid, COPFS established a Covid-19 Deaths Investigation Team (CDIT). It is the role of CDIT to capture and investigate all Covid-19 deaths reported that fall within its remit, including where the deceased was resident in a care home when the virus was contracted; where the deceased may have contracted the virus in the course of their employment or occupation; and where the death was reported under section 3 of the above guidance for other reasons, including relevant hospital deaths and deaths in custody. SFIU remit – deaths with covid but that's not really why they're reported. SFIU do have community acquired Covid deaths. A small number of deaths which involve community acquired Covid-19 or which raise an issue about whether a vaccine contributed to deaths have been reported to COPFS and are being considered by CDIT and SFIU.
106. The members of CDIT are staff of COPFS many of whom are experienced and skilled in death investigations and/or in health and safety investigations. CDIT is working together with other agencies including the Health and Safety Executive, Local Authorities, the Care Inspectorate and the Police Service of Scotland to ensure that appropriate investigations are undertaken in relation to these deaths. The Lord Advocate has also appointed two senior Advocate Deputes to provide direction and instruction to CDIT.
107. These arrangements ensure that the circumstances of each death can be fully considered by this dedicated team, and appropriate decisions made about any further investigation required with a view to helping to provide answers to

families who have lost loved ones, helping to prevent future deaths occurring in similar circumstances and taking any action that is required. As the Lord Advocate said when he addressed the Scottish Parliament in May 2020, the nature and extent of the investigation that is required in relation to any particular death or group of deaths will depend on the particular circumstances of each case. In some cases, the investigation required might be quite limited, and in others it might be more extensive. He also said that it would be premature for him to speculate on whether an FAI into any particular death or category of death from Covid-19 would or would not be appropriate. Those are decisions that will fall to be made on the basis of the circumstances of each particular case, once it has been investigated. CDIT investigations are at the level of individual deaths and must be compliant with Article 2 of the European Convention on Human Rights. The nature and degree of scrutiny required to satisfy the minimum threshold of the investigation's effectiveness in terms of Article 2 will vary depending on the circumstances of the particular death.

108. The purpose of CDIT's investigations is to ensure, so far as possible, that the full facts of the individual deaths are brought to light and to consider what, if any, further action is merited. This includes where there is evidence of criminality, prosecution where it is in the public interest to do so, the holding of a mandatory FAI as mentioned above and where appropriate, the holding of a discretionary FAI.
109. Many of the deaths cases subject to a full investigation by COPFS do not proceed to a discretionary FAI. This may be on the basis that no systemic failings have been identified which caused the death. Where systemic failings are identified, it may be that Crown Counsel instruct that it is not in the public interest to hold an FAI. In certain cases, the public interest may be satisfied by other means. The investigation of deaths by COPFS, or investigations initiated by organisations independently, may result in changes to systems, processes or procedures and these changes may mean that there is no focus for an FAI.

110. The work of CDIT is ongoing, with dedicated teams investigating different categories of case, engaging with nearest relatives and reporting to Crown Counsel for instruction where appropriate.
111. As part of their investigations CDIT, on the instruction of the Lord Advocate, have made requests of Scottish Government for documents held by them recording the Scottish Government's decision-making in response to Covid-19. The nature of a pandemic is that decisions taken at the level of government, public health officials or Health Boards could affect the outcomes of multiple patients. Therefore in order to satisfy our obligations under Article 2 of the European Convention on Human Rights, there is a requirement to consider how some of these higher-level decisions impacted on deaths. Requests have been tailored as the work of CDIT has progressed and have included a request for records of decision-making about the transfers of people from hospitals to care homes in the absence of testing and/or results. The Scottish Government have agreed to provide relevant documents and is in the process of supplying material.
112. As of today, 20 November 2023, a total of 6,013 deaths - 4,769 care home deaths, 44 worker deaths, 15 deaths in custody and 1185 hospital/hospice deaths – are under investigation by CDIT. The work of CDIT is resource-intensive. COPFS bid successfully for Scottish Government funding in addition to its departmental budget allocation to resource CDIT's work.
113. The overall number of deaths reported to COPFS increased significantly from the start of the pandemic and remains markedly higher than before the pandemic. During 2020/2021, which was the first year of the pandemic, there was a 44% increase on the pre-pandemic figures (2019/2020). During 2021/2022 this fell slightly to 40% and in 2022/23, the final figure was a 30% increase on pre-pandemic figures. Data for deaths cases reported from 2018/2019 is set out in "COPFS statistics on case processing in the last 5 years (2018-2023)" (SMG/75 – INQ000316376).
114. The increase in numbers of deaths reported is not explained entirely by the requirement for certain deaths related to Covid-19 to be reported during the

pandemic. The rise in reports, and corresponding increase in the number of post mortems instructed by SFIU (whether invasive or external only) may be pandemic related in that GPs have been unable to issue death certificates in situations when they otherwise would have done. This could be by reason of the fact that GPs had not physically seen the deceased for a period of time due to reduced face-to-face appointments. In 2019/2020 there were 5,645 post mortem examinations instructed by COPFS. In 2022/2023 this rose to 7,045. COPFS and other agency resource involved in the process of marking the death, communicating with families, moving the body to the mortuary, processing the body and post mortem examination is significant. The COPFS Pathology, Toxicology and Mortuary Board has oversight of this issue and how a return to the pre-pandemic approach can be effected.

LESSONS LEARNED

Criminal cases

115. It is clear from what I have said above about the development of policy in this area, particularly about the terms of the Lord Advocate's Guideline to the police on liberation, that COPFS was reviewing its guidance to police and prosecutors and its approach to Covid-19 cases throughout the pandemic and listened to feedback from the police, victims and other stakeholders.
116. Inspection of emergency criminal justice provisions by HM Inspectors provided some external oversight of the criminal justice system response to Covid-19.
117. The use made of certain of the emergency provisions in the Coronavirus (Scotland) Act 2020 and Coronavirus (Scotland) (No.2) Act 2020, and policy decisions in relation to liberation of accused persons from custody, was the subject of a thematic review undertaken jointly by HM Chief Inspector of Prosecution in Scotland and HM Inspector of Constabulary in Scotland in 2020. As noted above their report of this inspection was published on 30 September 2020.

118. Her Majesty's Inspectorate of Prosecution in Scotland (IPS) is an independent scrutiny body whose purpose is to inspect the operation of COPFS. The IPS is led by HM Chief Inspector of Prosecution in Scotland who is appointed by, and reports directly to, the Lord Advocate. The IPS has a statutory duty to report to the Lord Advocate on any matter related to the operation of the service which the Lord Advocate refers to them (Criminal Proceedings etc (Reform) (Scotland) Act 2007, section 79(2)).
119. Following discussions in summer 2020 with HM Chief Inspector, Laura Paton, the then Lord Advocate formally asked Ms Paton to inspect and report on the use and impact of key emergency criminal justice provisions introduced in response to the Covid-19 pandemic, and to consider whether any aspects of the emergency provisions could result in more efficient and effective ways of working in the longer term. The inspection considered the use of electronic signature and transmission of documents (Coronavirus (Scotland) Act 2020, Schedule 4, Part 1, Paragraph 1) ; remote, virtual attendance at court (2020 Act, Schedule 4, Part 1, Paragraphs 2-4); the national jurisdiction for first appearance from custody (2020 Act, Schedule 4, Part 3); and the Lord Advocate's Guidelines on liberation by the Police during Covid-19. Miss Paton agreed with HM Inspector of Constabulary in Scotland to conduct a joint investigation of these matters.
120. The report recognises that a collaborative approach has been taken across the system and that in particular there was an effective partnership between the police and COPFS. It noted that the provisions examined, which have generally been used to good effect, have been vital to keep the criminal justice system going during the pandemic. Some of the changes were long overdue and it was important to ensure progress is not lost after the pandemic. The report draws a distinction between responding to the public health emergency and future reform of the criminal justice system, though it is acknowledged that learning from the response may shape the transformation of the system. In terms of criticism, it was reported that a common view among criminal justice professionals is that a strategic vision for the long-term future of the innovations is lacking; that IT infrastructure is not sufficiently adequate to

support the technological innovations; and that there is a need to consult stakeholders about future direction.

121. The Inspectors found that the provision for electronic signature and transmission of documents was supported by effective governance. COPFS guidance was comprehensive and easy to follow. COPFS made extensive use of electronic signatures for a range of processes and at all levels of prosecution. It was suggested this provision should be retained beyond the pandemic and that was the view of 95% of respondents to the survey conducted by the inspection bodies.
122. On the provision for remote, electronic attendance at court, the Inspectors focused on virtual custody courts, which were used to a varying extent in different locations, and on agencies other than COPFS. They identified potential benefits to accused persons in staying in custody centres for their first appearance in court as some centres have comprehensive support services on hand including health care, social services, and housing. The most significant challenge was the extent to which accused persons were able to consult with their solicitor and participate effectively in proceedings. There was significant negative feedback on this. There were issues with the quality of video link and equipment failing. Virtual summary trials are discussed in the report though very few such trials took place during the pandemic due to the need to secure the consent of the accused to conduct a trial in this way. Virtual appeals hearings were noted to have worked well and this was identified as a viable model for most appeal hearings in the future.
123. The provision on national jurisdiction was used very little and the Inspectors considered opportunities to use this may have been missed. They noted that this provision could facilitate weekend courts, mooted as an option to reduce the backlog of summary trials as a result of the pandemic.
124. As noted above the revised Lord Advocate's Guidelines were noted to have had a positive impact on custody decision making, not strictly because of the content of the Guidelines, but rather because they prompted a cultural change in police custody decision-making.

125. There are no formal recommendations in the report, but a number of suggestions were made throughout the report including about retention of new powers.
126. COPFS has taken on board the Inspectors' findings, and has used the lessons learned by our experience during the pandemic, to inform its approach to reform of the criminal justice system.
127. The COPFS response to the pandemic has also been scrutinised by the Scottish Government Internal Audit and Assurance Directorate which produced a report on this on 27 March 2023 (SMG/76 – INQ000316377). This was overall a positive report with only two low priority recommendations made. The auditors concluded that COPFS has in place an effective and solid framework in relation to pandemic response arrangements, with a strong tone from the top and clear leadership, direction and engagement from a senior management level that cascades down to local business levels. They identified two areas of minor weakness relating to developing a more comprehensive and detailed lessons learned structure and strategic oversight and focus on 'recovery' as a specific area by the Executive Board.
128. The Inquiry may wish to be aware that in June 2022 Audit Scotland produced a report (SMG/77 – INQ000316378) on the overall Scottish Government response to the pandemic, Scotland's financial response to Covid-19; and published an update to this in March 2023.

Investigation of deaths

129. As I have explained, one of the purposes of the investigation of deaths by COPFS, whether or not this results in the holding of an FAI, is to learn lessons for the future. This is the case with Covid-19 deaths reported to COPFS which are being approached in a methodical way by a specialist team and dedicated Crown Counsel. As I have said, the work of CDIT involves examining decisions about public health measures taken by Scottish Government during the pandemic.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Signed:

Personal Data

Dated: 20 November 2023