REVIEW OF SUMMARY JUSTICE

PRACTITIONER WORKSHOPS: BACKGROUND PAPER

The attached paper sets out the Committee's initial views on changes which might be made to specific aspects of the summary justice system. These reflect the broad terms of the remit which the Committee was set by the Deputy First Minister – 'to make recommendations to improve the efficiency and effectiveness of the summary justice system'.

The format of the workshop is for participants to select two areas for discussion from the following topics:

- Issues of delay
- Focusing the issue
- Encouraging early pleas
- Trajectory/Throughput
- Diversion from prosecution
- Fine Management
- Appeal Court

We hope to stimulate debate amongst court practitioners in 'break-out' groups and take views on the practicalities of the suggestions for change we have made. It is appreciated that some of these suggestions, statutory time limits in summary proceedings for example, could have serious resource implications for the principal agencies involved and others, such as formal sentence discounting, are in themselves controversial. Our aim, therefore, is to take the opportunity to explore in detail with those at the sharp end of the criminal justice system what impact such changes might have and whether they are in fact workable.

Following discussion of these issues a summarising report will be given by each group to the full body of participants. For the Committee's benefit a note of discussions in the break-out groups will be taken. This note will not be placed in the public domain and is intended only to help inform our continued deliberations on the topics being discussed.

The workshop is separate from the First Order Issues consultation which we undertook in March 2002. It is not our intention to revisit those broad issues concerning the overall structure of the summary justice system at this stage and we would prefer to focus on those matters of detail directly impacting on current summary practice.

I would like to take the opportunity to stress again that in order to encourage full and effective participation at this event, any views expressed will remain private. Similarly, views expressed will be taken as those of individuals and not as those of any representative bodies, who will be consulted on our suggestions at a later date.

I would like to thank you for agreeing to participate at this workshop and I am sure that the Review Committee will gain much from your input.

Sheriff Principal John McInnes

(1) Issues of delay

Statutory time limits and Targets

The Committee considers that the idea of summary justice no longer applies in its original sense. That is, summary cases take too long to complete and the processes of summary justice are too slow. It is generally accepted that unless summary cases are dealt with expeditiously the issues of appropriate penalty and rehabilitation become seriously compromised. Additionally, problems arise regarding the recollections of witnesses and the passage of time also often results in difficulties in tracing witnesses.

The Committee is aware that many of the agencies within the justice system do already operate to targets. For example, having cautioned somebody, the police generally operate up to a 6 week target in which to provide a report to the procurator fiscal. The fiscal then generally operates to an 8 week target for the case to first call in court (it is accepted that there are local variations in these targets). The Committee considers that this 14 week period, which might be stretched yet further as a result of operational difficulties, and in particular if an accused is offered a fiscal fine, to be too long. The Committee has also noted that these are administrative targets with no sanction available if they are not met.

The Committee has identified three particular performance targets which might be set:

- time between date of offence (or identification of an alleged offender) to the start of proceedings
- time between date of offence (or identification of an alleged offender) to the start of trial
- time between case first calling and the trial commencing

The main issue which arises from the consideration of targets is whether they should be statutory time limits or performance indicators. That is, should a case fall if a time limit is not met? There are arguments against both – performance indicators have no meaningful sanction if not adhered to; conversely, there would undoubtedly be public concern if large numbers of summary cases fell simply because they had passed a certain time barrier. It is also recognised that the introduction of any statutory time limit would have resource implications which would require to be addressed before its introduction.

The Thomson Committee of 1975 recommended that there should be time limits of 3 months between the offence (or sufficient evidence being made available to prosecute) and the issuing of the citation or warrant, 4 months between the offence and the first diet and 6 months between the offence and the trial. The Committee opined that 'in most summary cases the offence and the culprit are ascertained immediately and accordingly no more than more six months, and we would hope much less, would elapse between discovery of the offence and trial. There would require to be relaxation for cases where the trial could not commence within the six months on account of illness of the accused or of an essential witness or for some other good reason for the which the prosecutor is not responsible. The court would have a discretionary power to extend the period in such circumstances. Furthermore, if an accused left his usual residence and his whereabouts were unknown, so that he could not be cited or arrested timeously, or if he failed to appear at a diet to which he had been lawfully cited, he would not be permitted by doing so to defeat the ends of justice. In these circumstances the prosecution would not be time-barred if the prosecutor satisfied the court that all due diligence had been exercised in the attempt to cite the accused or

execute the warrant for his arrest.' The Thomson recommendations were not accepted at that time and the Committee considers that they should now be revisited.

If a statutory time limit for the completion of cases, or stages in proceedings, was introduced the performance of agencies within that time limit should be monitored. Procedures should be put in place to ensure that the performance of the system *as a whole* is measured:

- police – time taken to report to fiscal from date of recording offence (or identification of an alleged offender)
- fiscal – time taken from receipt of police report to service of complaint
- courts – time taken from registration to start of trial

The same principle of monitoring performance should apply if an overall *target* for the completion of cases was set, rather than a statutory time limit.

Issues for discussion are:

- *a statutory time limit for the start of summary proceedings (from the date of crime or identification of an alleged offender)?*
- *a statutory time limit for the start of a summary trial (from the date of crime or identification of an alleged offender)?*
- *a statutory time limit between the case first calling and the trial commencing?*
- *the circumstance in which extensions might be granted?*
- *whether performance targets rather than statutory time limits might be more appropriate?*

Increased use of Undertakings

The Committee considers there to be merit in considering whether the bail undertaking scheme, based on that currently used to fast track certain cases, often drink driving cases, in certain courts should be extended. In these cases, the accused is usually released from a police station on charge having given an undertaking to attend the Pleading Diet on a certain date. This system allows for cases to be brought to court significantly faster than via the normal citation route. The complaint is served on the accused when he or she appears in court in terms of the undertaking on the specified date.

Under such a scheme, at the police station the accused would sign an undertaking to appear at a particular court on a particular date, at a particular time. The police would have access electronically to the availability of slots in the court programme within the following three weeks. Local arrangements might be put in place to limit the number of cases which would call in court on specific dates.

The Committee recognises the serious resource implications of such a scheme and wishes to identify in broad terms those types of cases that might warrant inclusion. These might include the more serious summary cases, possibly defined as those which seriously offended public order. Alternatively, such a scheme could encompass all summary cases other than those deemed appropriate for appearance from custody or where a non-custodial disposal is thought to be appropriate. The Committee considers that these undertaking cases could reasonably be expected to call in court within 2-3 weeks of the undertaking being given.

Cases not dealt with from custody, by bail undertaking or by police fixed penalty (mentioned later in this paper), would be reported to the fiscal by the police for consideration.

Accordingly, the Committee suggests that the alternatives open to the police at the time of apprehension might be:

(a) police fixed penalty

(b) detention in custody pending court appearance

(c) release on undertaking to appear in court at a given date and time

> The use of this type of procedure might be substantially increased. When the case called on the date given, the fiscal would:
>
> (i) serve a summons and the case would proceed
> (ii) move for the case to be continued on the strength of the undertaking for further investigation or for consideration of diversion or offer of fiscal fine
> (iii) intimate in advance to the accused that the case would not call and arrange for form of diversion
> (iv) intimate in advance to the accused that the case would not call and offer a fiscal fine

(d) report to fiscal with a view to

> (i) citation
> (ii) diversion
> (iii) fiscal fine (to include date of court hearing if not accepted)
> (iv) no proceedings

Issues for discussion are:

- *the level of case serious enough to warrant inclusion in an extended bail undertaking scheme?*
- *offer of fiscal fine to include date of court hearing if offer not accepted?*

(2) Focusing the issue

Disclosure

The Committee is of the view that one area which has the potential to increase the focusing of the issues early in the lifetime of a case is the disclosure of evidence.

If a summary of evidence was provided to the accused with the service of a complaint, the initial meeting between the accused and their solicitor, when instructions are taken, would be more meaningful. The accused would be aware of the nature of the case confronting them and therefore in a position to instruct an early plea of guilty, if appropriate.

There might also be merit in providing full police and civilian statements to the defence prior to the Intermediate Diet. The Committee is aware that the provision of full police witness statements does already occur and considers that it has the potential to increase the number of occasions when police witness evidence is agreed prior to trial, in turn reducing the frequency of court appearances. Similarly, although defence solicitors still rely heavily on obtaining evidential information from civilian witnesses by means of precognition, the Committee understands that it has become increasingly common practice to submit requests to the fiscal for the provision of civilian witness statements. The Committee considers that provision of civilian and police witness statements to the defence prior to the Intermediate Diet might increase the opportunity to agree non-contested evidence and enhance the prospect of pre-trial pleas. Crown productions, including any video evidence, might also be made available to the defence in advance of the Intermediate Diet.

Consideration should also be given to requiring the prosecution to advise the defence of the witnesses they intend to cite. The defence is currently provided with a list of all witnesses and it will not always be clear which the Crown intends to cite. Consequently, the defence will usually precognosce all witnesses since that is the only way to build up a picture of the case and find out which witnesses are significant. By marking those which are expected to be cited, and this could be done by the Crown on a 'without prejudice' basis, solicitors would be able to prioritise precognition and not feel obliged to precognosce all witnesses.

It is open for discussion as to whether the court ought to be notified of previous cases of fiscal fines or diversion schemes when the accused appears in court. Currently, accused who have previously accepted a diversionary scheme are often presented to the court as first offenders and it is arguable that this is not in the overall interests of justice. However, the Committee is of the view that any information on previous diversion disposal should be available only to the court and not form part of a person's criminal record.

Issues for discussion are:

- *provision of a summary of evidence with service of the complaint to the accused?*
- *provision of full police and civilian witness statements to the defence in advance of the Intermediate Diet?*
- *Crown marking of witness lists to show which were expected to be cited?*
- *Previous fiscal fines and diversion schemes being brought to the attention of the court?*

Agreement of evidence

The Committee is aware that in some circumstances the evidence of a particular witness will be of a purely formal nature and unlikely to be subject to cross-examination. In these situations, it is arguable that the onus should be on the defence to demonstrate at the Intermediate Diet why it cannot agree such non-controversial evidence (such agreement of course being dependent on the witness statement being available). If the defence did not persuade the court that the presence of a witness was necessary in the interests of justice the police statement of that witness would be taken as evidence in the case.

One objection to such a requirement is the view that it is the right of the defence to put the Crown's evidence to the test. However, the defence would retain the right to argue to the bench why a particular witness is required. The Committee does not think that this would alter the burden of proof or otherwise affect the right of the accused to a fair trial.

Issue for discussion:

- *the defence to be required to demonstrate at the Intermediate Diet why, in the interests of justice, it is necessary for any particular witness whose evidence might be regarded as non-controversial to be present*

Improving effectiveness of Intermediate Diets

The Committee is of the view that the effective and efficient operation of the Intermediate Diet is crucial to the successful operation of the summary justice system. In summary, it can be said that the Intermediate Diet was introduced to the summary system as a mechanism a) to reduce the number of cases which proceed pointlessly to trial and b) to reduce the number of witnesses called in those cases which proceed to trial.

The Committee considers that the Intermediate Diet in many courts does not work as originally envisaged. On many occasions neither prosecution nor defence is properly prepared. If Intermediate Diets are to be properly managed by the bench this can only be done if there is adequate preparation by the defence and prosecution. Consequently, a change of emphasis is required. The Intermediate Diet should be seen as providing certification that a case is ready to and will proceed to trial. If there is to be a plea of guilty it should be at the Intermediate Diet. Any question of accepting a reduced plea should be discussed prior to the Intermediate Diet. If there is capacity to agree evidence, it should be done at the Intermediate Diet. It should be confirmed at the Intermediate Diet that all witnesses have been cited. The Committee is of the view that if the parties involved knew that their actions would be scrutinised and questioned by the bench they would are likely to be properly prepared. Court culture is therefore important.

Successful operation of the Intermediate Diet also requires the close collaboration of the defence and prosecution. There is a tendency for both parties to blame each other for not having met to discuss a case prior to the Intermediate Diet and one solution may be to introduce a statutory requirement to have a 'case management' meeting prior to the Intermediate Diet - this could be discharged by electronic means. The Committee appreciates that there are recognised resource difficulties facing the fiscal service, and that solicitors might have difficulty in receiving instructions from their client prior to the Intermediate Diet.

Nevertheless, there is arguably scope to improve on current levels of liaison between the defence and prosecution.

There may also be merit in introducing to the Intermediate Diet a procedure similar to judicial examination in solemn matters. The accused would be advised that, having received the Crown statements, this provided an opportunity to submit any admission they might wish to make. It would also provide the opportunity to state any denial, explanation or justification of, or to comment in any way on, the matters referred to in the charge or charges. It would be explained to the accused that they did not require to make any such statement, but if they did not do so and evidence was led on their behalf at the subsequent trial on any such matter, the failure to make a statement at the Intermediate Diet could be commented on. The Committee has noted, however, that the purpose of the Intermediate Diet is effective case management and to introduce matters that might have evidential consequences could be an obstacle to achieving these management objectives.

Issues for discussion:

- *the bench to be proactive in ensuring*

- appropriate disclosure to the defence
- evidence of witnesses is necessary in the interests of justice

- *the accused to have the opportunity to make a statement on the evidence made available to them*
- *a statutory requirement for the fiscal and defence to meet prior to the Intermediate Diet?*

Trial in absence

The Committee is aware that the House of Lords in an English case has concluded that, given fair notice that a trial will proceed in his absence, a deliberate and conscious decision by the accused to take no further part in a case is sufficient to allow it to proceed. In essence, a demonstrable complete indifference to the proceedings was held to be sufficient to conclude that the accused has waived their rights to take part in proceedings. Integral to this system of trial in absence is the provision of section 142 of the Magistrates' Courts Act 1980 which allows a case to be reopened in the interests of justice in order that a sentence be varied or rescinded. Such a provision could come into effect where the accused provided reasonable excuse for having been absent from the trial. The procedure to reopen a case has the attraction of being administratively simpler than pursuing a formal appeal.

It is for discussion whether a similar trial in absence provision in Scotland could have a significant impact in changing court culture and provide efficiency savings. Many cases are currently routinely adjourned due to the non-appearance of the accused. We envisage that the accused would be warned at the Intermediate Diet that non-attendance at the Trial Diet could result in the case proceeding to trial in his or her absence. While a trial could proceed in the absence of the accused, it is again for discussion whether they should be brought before the court before sentence, or only if the sentence is to be other than a fine. The maximum impact on court culture would occur if trial in absence became a matter of routine rather than only applied in exceptional circumstances. Of course, trial in absence will not be appropriate in all circumstances and the bench will ultimately require to consider each case on its merits.

The Committee has observed that there will be cases where the identification of the accused will be required on the day of trial. This might be addressed by police taking photographs of the accused at the time of arrest.

Issues for discussion:

- *trial in absence to be used in instances of non-appearance of the accused?*
- *factors that should be taken into account when deciding whether a case should proceed in the absence of the accused?*
- *introduction of statutory provision similar to section 142 of the Magistrates' Court Act 1980?*

(3) Encouraging early pleas

Sentence Discounting

Section 196 of the Criminal Procedure (Scotland) Act 1995 allows courts to take into account, in determining sentence, at what stage of proceedings the accused indicated his or her intention to plead guilty. Guilty pleas will normally be tendered at one of three stages, namely the Pleading Diet, the Intermediate Diet and the Trial Diet. The Committee is interested to have views as to whether the system should be structured to attract a guilty plea at the earliest possible point in the process. The main argument in favour of such a scheme is that there would be a clear incentive for the guilty accused to make an early plea. The main objections are that if a person is innocent they are entitled to a trial without additional punishment and that some innocent parties might be induced to plead guilty.

The current provision is considered to be a useful compromise option open to the Bench to utilise but it is not always clear that the discretion is routinely used, and even where that discretion is used it is not always done in a transparent fashion. Because it is not clear if the bench will take an early plea into account it is currently difficult for the defence to advise an accused to plead guilty on that basis.

An important consideration for the discussion of any formalised discounting scheme is whether discounting should alter the type of sentence, for example from a jail term to a fine or community service. On one view the main point of sentence discounting is discounting within bands ie reductions in fines, prison sentences and community service orders. A key issue for the accused, however, is whether an early plea will result in a non-custodial sentence.

Issues for discussion:

- *should there be a formal discounting scheme or would current arrangements operated in a more transparent fashion be sufficient?*
- *should there be discounting between types of disposal?*

Legal Aid

Legal aid has an important influence on the criminal justice system and the Committee has noted that because of its structure in summary procedure, there is an apparent disincentive for defence agents, in cases which might be susceptible to swift resolution by negotiation of a reduced plea, to advise their clients to make an early plea of guilty. Block fees, of differing values in the district and sheriff courts, are only paid to defence agents when their client pleads not guilty. Defence agents are only paid 'Advice and Assistance' rates for advising clients at any point up until a plea of not guilty has been recorded and a full legal aid certificate granted. Where their client intends to plead guilty at a cited Pleading Diet and there is a real risk of a custodial sentence they are paid 'Assistance by way of Representation' (ABWOR). In custody cases the legal aid duty scheme operates.

Though the provision of legal aid is arguably not directly within its remit the Committee wishes to highlight the perceived disincentive to encouraging an early guilty plea. This might

be addressed by some front-loading of legal aid to allow proper remuneration of defence agents in cases where an early guilty plea was intimated.

The Committee has also noted that it is not uncommon for trials to be delayed in cases where a legal aid application had been made and refused and the decision on the appeal against this was pending. One possible solution to this would be for legal aid to be granted in all cases on the basis of the accused certifying that their income was below a certain level. Views are sought on this matter.

Issues for discussion:

- *do current legal aid arrangements militate against an early plea of guilt?*
- *if so, what changes should be made?*
- *should the provision of legal aid be automatic?*

Consistency of sentencing

The Committee is aware of concern that there is a lack of consistency between benches in sentencing and that this arguably contributes to delays in summary cases.

Because the defence and accused become aware of different sentencing attitudes between benches, and because the different stages of summary cases are not necessarily dealt with by the same bench, there is an incentive to avoid pleading at one stage in the hope that the accused will encounter a more lenient bench at the next stage.

The Committee recognises that though sentencing is always a matter for the discretion of an individual judge, increased judicial training might lead to greater consistency. The Committee considered what impact sentencing guidelines, as used in England and Wales might have, but notes that while they might be beneficial when considering statutory offences and levels of fine they would have limited value in relation to common law offences. The Committee has also noted that the High Court to date has in general declined to set sentencing guidelines.

The Committee's preferred route toward consistent sentencing, on which views are sought, is the introduction of a new summary appeal court presided over by a bench with substantial summary court experience. Such a court might for example be comprised of a sheriff principal and/or experienced sheriffs on secondment. The Committee expects that by hearing all summary appeals and giving reasons for their decisions, which would be widely disseminated, perhaps via a sentencing information system, the court would be seen to set tariffs. It is for discussion whether such a court sitting on circuit, or centrally, would be most accessible and cost efficient.

Issue for discussion:

- *would a separate summary criminal appeal court, perhaps sitting locally, be the best way of ensuring consistency of sentencing?*

(4) Trajectory/Throughput

Adjournment culture

The Committee has noted there is a perception that many summary courts suffer from an adjournment culture. For example, the prosecution regularly has problems with witness citation, particularly in cases coming to trial a very long time after the offence, with the main complaint of the defence being that their case is not fully prepared.

Recent research suggests that the most important factor in minimising adjournments is management by the bench. The bench is seen by other parties in the court process as having considerable discretion not just in deciding whether or not to grant an adjournment request, but also in the extent to which they actively question a party requesting an adjournment as to whether it is really necessary. The Committee is aware that in many cases where the defence and prosecution have agreed on the need for an adjournment that fact is seldom questioned by the bench. The research concludes that if a bench is proactive, less adjournments are likely to be requested and those that are requested are more likely to be necessary.

The Committee is also aware of specific concerns regarding Social Enquiry Reports. Social Enquiry Reports are routinely commissioned, resulting in adjournments, and the delay attributable to this is compounded when the accused fails to appear at the next Diet or if the Social Enquiry Report has not been completed on time. Views are sought on whether a new SER should not be automatically required if there is an existing one which is less than 3 months old. The Committee has observed that there is currently a requirement under section 203 of the Criminal Procedure (Scotland) Act 1995 for a Social Enquiry Report to be obtained before disposal of a case involving a person already under supervision by order of a court. It is arguable that the introduction of this requirement has added significantly to the number of Social Enquiry Reports required and applied in cases even where the disposal immediately under consideration is a very low tariff for a minor offence. The Committee wishes to take views on whether this statutory requirement might be replaced by more flexible arrangements, leaving discretion with the bench on which of three options to choose; no new Social Enquiry Report, commission a new Social Enquiry Report; or request a 'stand-down' report on the day. The stand-down system was brought to the attention of members of the Committee during visits to Magistrates' Courts in England. At these courts a duty social worker was on hand to conduct an interview with the accused prior to sentence.

Issues for discussion:

- *how to change attitudes to reduce the number of adjournments*
- *the introduction of 'stand-down' Social Enquiry Reports*
- *if recent Social Enquiry Report available, then new Social Enquiry Report to be produced only if considered necessary by bench*

Prioritisation

The Committee is aware of suggestions that certain types of cases should be fast-tracked within the summary system. There are a wide variety of cases that might be given priority treatment, for example: drugs/domestic abuse/road traffic/alcohol/young offenders. The Committee has noted that individual pressure groups have put forward their own particular interests as deserving of special attention. Prioritisation of certain cases also avoids the wider

issue of problems of general delay within the summary system. Though the question of overall delay in the summary justice system is the main point under discussion the Committee wishes to take views on whether certain types of case should be prioritised.

Responses to the Committee's First Order Issues consultation suggested that specialist courts be set up to deal with specific types of case, expanding on the precedent set by the Glasgow Drugs Court. Such a proposition might only be realistic for areas dealing with high volume caseloads. Also, while Glasgow Drugs Court is viewed as being a successful innovation it has only dealt with a limited number of cases since inception and is resource intensive.

Issues for consideration:

- *should certain categories of case be prioritised?*
- *should there be more specific courts – e.g. domestic violence courts?*

Persistent Offenders/Multiple Charges

The Committee considers that steps could be taken to address situations where the accused faces several complaints proceeding at different stages through a number of different courts. These cases give rise to inefficient practices such as the transportation of the prisoner to different localities in the same day or the adjournment of cases because the accused is in custody or appearing at a different court.

One solution to the problem would be to give discretion to the Crown to 'roll-up' complaints and deal with them at one court and at one sitting, regardless of the stage which each case had reached and the fact that cases were outstanding in different jurisdictions. Rolling up complaints would reduce the number of appearances an accused with multiple complaints would make, though the Committee recognises that in some cases there may be outstanding complaints spread across the country resulting in inconvenience to witnesses.

Issue for consideration:

- *how to roll-up or consolidate multiple charges across types and location of courts?*
- *how to manage potential impact on witnesses who may be required to travel to give evidence?*

Case Loading/Court Hours

Concerns have been brought to the Committee's attention that some courts have overloaded trial courts. The Committee considers there to be a fine line between having enough business for a working day (allowing for non-appearances and adjournments) and so many cases that the accused knows that some cases will require to be adjourned, thus providing a disincentive to plead.

The Committee would also like to take views on whether there would be merit in courts sitting outwith normal operating hours, it being argued that maximising the use of court estate would lead to overall efficiency savings. However, extra court sittings might only be appropriate for those courts facing a heavy workload, such as Glasgow; 'shift' work for

fiscals, court staff and sheriffs would have to be considered; and the position of defence agents, in particular small firms, would have to be given careful consideration.

Issues for discussion

- *should court days be extended?*
- *is there a case for evening courts?*

(5) Diversion from prosecution

The Stewart Committee took the view that substantial savings could be achieved by the use of alternative procedures which, with the acceptance of the offender, would cut out all the formalities associated with a prosecution in court. The Committee considered that, in minor transgressions, the traditional mode of dealing with breaches of the criminal law was not necessary and a less involved process might, with the concurrence of the offender, serve better both their and the public interest.

The Stewart Committee gave its reasons for taking this view.

(1) prosecution of offenders who commit minor offences may be an exaggerated and inappropriate response to the commission of the offence

(2) the process of prosecution, court appearance and sentencing can stigmatise and label some minor offenders in an unnecessarily harmful way

(3) some offenders are more in need of help or treatment than of punishment

(4) an increased use of diversion at the stage before prosecution could relieve pressures on the criminal courts and help reduce delay and costs

(5) some forms of diversion may be a cheaper means of dealing with the offence than prosecution, and punishment imposed by a court

These arguments were of course largely accepted and laid the basis for the wide range of diversion schemes currently in operation in the summary justice system. The Committee considers that it is time now to look at whether further use of diversionary schemes is appropriate, and also what changes might be made to increase the efficiency and effectiveness of the schemes currently in operation.

Fiscal fines

The fiscal fine was established by s56 of the Criminal Justice Act (Scotland) 1987 and is now established as a valuable and effective alternative to prosecution in less serious cases that would otherwise result in prosecution in the district court. Their use by fiscals is subject to guidance issued by the Lord Advocate. Levels of fiscal fine have been set at £25, £50, £75 and £100. If payment is made no prosecution is brought and no conviction is recorded against the accused. The fact that a fiscal fine has been made and accepted can be disclosed to an interested party in those proceedings. Where an offer of a fiscal fine is made and not accepted, the fact that an offer was made can be disclosed to the court. It is clear that since its inception that the fiscal fine has been responsible for a significant reduction in the numbers of cases that would otherwise have been dealt with in the courts. In 2001/02 for example, 20,476 cases were closed by the offer of a fiscal fine. Out of a total of 33,229 fiscal fine offers in 2001/02 17,739 were £25 and 12,062 were £50. The £75 and £100 fiscal fines are therefore relatively infrequently used.

Against this background, the Committee wishes to take views on the potential for increasing the levels of fiscal fine. The majority of fines imposed in the summary courts are comparatively modest - in 2000 the average fine imposed in the sheriff court was £262, £188

in the stipendiary magistrates court and £92 in the district court. It follows therefore that to markedly reduce the numbers of cases appearing in court, the fiscal fine would need to encompass a significant proportion of actual fines imposed in court of between say £100 and £200. The issue of course arises as to what types of offence might appropriately be dealt with by way of fiscal fine. At this level of seriousness, it might be argued that the cost and resource savings are outweighed by the interests of victims, or the necessity of bringing the full burden of the justice system to bear on offenders who have committed certain levels of offence.

The Committee is aware of concerns that the existence of previous fiscal fines imposed on an accused are not made known to a court, leading on occasion to such people being treated as a "first offender". There are difficulties to be overcome with this situation in that acceptance of a fiscal fine does not equate to an admission of guilt, and that it might not necessarily be a desirable outcome to further increase the percentage of the population who have a criminal record. Nonetheless, it might be appropriate to inform an accused person that in accepting a fiscal fine, they should be aware that a court might be informed of that fact if it was relevant in a future case.

The Committee is also aware of concerns regarding the situation whereby if the first £5 instalment of a fiscal fine is paid the offender is no longer liable to prosecution, and the means of enforcing the outstanding balance are restricted. Views are sought on whether liability to prosecution should only be waived once the full balance of the fiscal fine is paid.

The Committee considers that there may be scope to increase the acceptance rate of fiscal fine offers, and wishes to take views on the following:

- simplifying the language and improving the clarity of the fiscal fine offer letter
- sending colour-coded letters and reminders
- including a court date on the offer letter that the accused would be required to attend if the offer was not accepted. This would be likely to produce court scheduling difficulties, but would emphasise to the accused the consequences of rejection of the offer

Issues for discussion:

- *scope for increasing levels of fiscal fine?*
- *previous fiscal fines to be citable in subsequent trials?*
- *consequences of not accepting fiscal fine to be clarified in offer letter for benefit of accused?*

<u>Fiscal Compensation Orders</u>

It is the Committee's understanding that fiscal fines are not generally offered if it is thought that compensation would form all or part of the most appropriate disposal for a specific offence. The Committee therefore wishes to take views on whether, in the interests of reducing the number of minor cases appearing in courts, a compensation order which would be fixed by the fiscal in the same way as a fiscal fine might be introduced.

In 2000, compensation orders were imposed in 4% of cases proved in the Sheriff Summary Courts and 6% in the District Courts, with average values of £345 and £121 respectively. As particular candidates for the use of compensation orders there were 5,500 cases of simple assault and vandalism and some 3,300 shoplifting cases where such a disposal might have been relevant.

The Committee appreciates there may be some difficulty for fiscals in setting compensation order values for personal physical or mental harm. Concerns have also been raised with the Committee as to whether victims would be content with this approach. On the other hand it may be that victims would prefer the imposition of a fiscal compensation order if it avoided the need for court appearance(s). An additional discussion point is whether compensation orders could be paid in full immediately from central funds and then recovered from the accused.

Issue for discussion:

- *scope for introduction of fiscal compensation order*

Other diversion schemes

In 2000 1,277 cases were referred to diversion schemes by procurators fiscal. The schemes fall into two broad categories – those run by criminal justice social work departments of local authorities, which cater for offenders with particular social or mental problems such as drug or alcohol addiction or high levels of indebtedness. The second category is a limited number of mediation and reparation schemes providing a form of restorative justice and run by SACRO. It appears to the Committee that both types of schemes are limited by the number of places available, rather than by the number of suitable clients and it may be that an increase in the availability of places on such schemes would reduce the number of court prosecutions. It is also arguable that such schemes should be available on a national basis and potential candidates not subject to a post-code lottery of provision. The Committee is aware that there is a risk that the extension of such schemes could lead to a degree of net widening - in effect providing an alternative to "no proceedings" rather than to prosecution.

There is a lack of centrally-held information on the extent and scope of the schemes in operation throughout Scotland, and of any evaluation of the costs and benefits of the schemes. Although the schemes the Committee has looked at appeared to work well and were supported by fiscals and social workers, recommendations on their relative efficacy as a disposal are on the margin of the remit of its work. However, those involved directly in their use may have views on whether or not there is scope for expanded use.

At present fixed penalties notices (FPN) are generally only issued by the police in Scotland in respect of certain categories of motoring offence. The Committee is aware of pilot schemes in England where police are be able to issue fixed penalty notices for a range of low-level, anti-social and nuisance offending. The advantages of such a scheme are that it offers swift and simple justice for the most minor of offences while reducing administrative burdens on the police and courts. There appear to be clear efficiency savings to be gained by allowing police to deal with minor offences in this way.

The Committee is aware of concern about increasing police discretion by widening the range of offences for which a police fixed penalty might be offered, and also the potential net-widening effect of such a scheme. However, there is already a range of agencies that issue fixed penalty notices as an alternative to prosecution. In addition, any new scheme might be accompanied by guidance from Crown Office, who would retain an oversight role in how the type of offences covered by a fixed penalties are dealt with. Their use could also be monitored to check for any national disparities. The following issues arise: should the range of offences for which police fixed penalty notices can be imposed increased?; if so, at what level(s) should they be set? ; should they be referable to in court? should there be acceptance of guilt? should Crown Office overview their operation? should Crown Office issue operational guidance?

Issues for discussion:

- *scope for further use?*
- *further use of police fixed penalties?*

(6) Fine Management

The Committee recognises the importance of the fine as a penalty in the summary justice system. The benefits of the penalty are that it is:

- flexible – can be tailored to seriousness of offence and the means of the offender
- cheap to administer
- does not normally disrupt the life of the offender.
- it has the lowest reconviction rate of any penalty imposed by the courts

In 2001, from the data which is available to the Committe, 82% of district court fines and 60% of sheriff court fines imposed were fully collected. The equivalent figure for England and Wales was 59%. The Committee is aware of persistent concern that changes need to be made to fine management to make it easier to pay fines and also to make their enforcement more effective. In 2001, for example, there were over 7,000 prison receptions for fine default and it is often argued that this is a wasteful burden on resources and also out of proportion to the original punishment imposed.

Imposition

It has been suggested to the Committee that in many instances non-payment of fines is linked to an inability on the part of the offender to pay unrealistically high fines and conversely that the imposition of a fine constitutes a much less severe penalty on better-off offenders. A day or unit fine system such as that used in some Scandinavian countries, that directly links a penalty to an offender's income has been suggested to us as a possible alternative approach. The Committee has noted that a day/unit Fine scheme was introduced in England and Wales but abandoned with conflicting views on the complexity of managing the system. However, it is clear from the Committee's visits to Magistrates Courts that they consider the principle to have been retained. For example, the Nottingham Magistrate Sentencing Guidelines in particular encourage Magistrates to multiply or divide a fine with direct regard to an offenders' means. The system in Scotland is much looser, whereby the bench must have regard, amongst other things, to the means of an offender, so far as is known to the court.

Issue for discussion:

- *To what extent should there be a link between court imposed fines and an offender's means?*

Collection

Increasing payment opportunities have the potential to improve collection rates, although evidence from Magistrates Courts in England and Wales suggests that improvements are unlikely to be dramatic. Nevertheless, it is clearly sensible to make the payment of fines as easy as possible and candidates for change include:

- the use of debit and credit cards
- online payment
- payment at local authority outlets
- payment outlets, such as the Pay Point scheme operated at local retail shops

Issue for discussion:

- *scope for enhancing payment opportunities*

Enforcement

The Committee wishes to take views on whether a centrally managed enforcement regime, that clearly sets out a series of graduated steps that will inevitably follow if fines are not paid, could also improve collection rates and overall enforcement. At present, each local authority and the Scottish Court Service operate their own collection and enforcement policies. This results in widely varying methods of payment nationally and different levels of enforcement for similar fines.

The central management model has been developed in Australia and New Zealand, and is also now proposed for fine collection in England and Wales.

The series of steps that would follow non-payment might be:

- late payment surcharge
- fine enforcement surcharge
- simplified procedures for the arrestment of wages or benefits
- loss of entitlements – for example, suspension of a person's driving licence
- supervised attendance or electronic tagging order related to the amount of fine (with imprisonment for breach of order – but no imprisonment for fine default itself)

There is currently a high level of judicial involvement in the enforcement of fines. Most of the above enforcement sanctions could be applied administratively by fines enforcement officers. It is accepted, however, that judicial involvement would be required for any sanctions affecting livelihood or liberty.

Issues for discussion:

- *central enforcement agency?*
- *penalties/sanctions for non-payment*
  - *late payment surcharge/enforcement fee*
  - *loss of privileges e.g. suspension of driving licence*
  - *use of tagging/SAOs*

(7) Appeal Court

New Summary Appeal Court

All summary criminal prosecutions can be appealed on grounds of conviction and/or sentence. Appeals against conviction are usually questions of law, while appeals against sentence are usually that it is excessive given the circumstances of the case. All appeals from the summary courts are currently considered by judges in the High Court. The difficulties with this arrangement are that the High Court is under considerable pressure of business and that judges in that court have little practical, recent experience of summary court business. It is arguable that the current summary appeal system is not as efficient or effective as it might be.

Additionally, as is noted earlier in this paper, it has been suggested to the Committee that a perceived lack of consistency between benches in sentencing contributes to delays in summary cases. Because the defence and accused become aware of different sentencing attitudes between benches, and because the different stages of summary cases are not necessarily dealt with by the same bench, there is an incentive to avoid pleading at one stage in the hope that the accused will encounter a more lenient bench at the next stage. The Committee's preferred route toward consistent sentencing lies in the introduction of a new summary appeal court presided over by a bench with substantial summary court experience.

Such a court might for example be comprised of a sheriff principal and/or experienced sheriffs on secondment. The Committee expects that by hearing all summary appeals and giving reasons for their decisions, which would be widely disseminated, perhaps via a sentencing information system, the court would be seen to set tariffs. It is for discussion whether such a court sitting on circuit, or centrally, would be most accessible and cost efficient.

It has been put to the Committee that some very important points of principle have arisen in summary appeals against conviction and that these should appropriately continue to be heard by the High Court. The majority of summary appeals are in fact routine appeals against sentence only and appeals against conviction would not place a heavy burden on the High Court's resources.

Issues for discussion:

- *judges?*
- *location(s)?*
- *appeals against sentence only or sentence and/or conviction?*

Other proposals

If there are any other proposals which you consider might improve the efficient and effective delivery of summary justice in Scotland it would be of assistance if these were committed to paper and handed in at the event. If you would prefer to submit any proposals anonymously, or simply after the event has taken place, please send them to:

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