The Summary Justice Review Committee

REPORT TO MINISTERS
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I have great pleasure in presenting the report of the Summary Justice Review Committee. I believe that our recommendations, taken as a whole, represent a good solution to the problems which there currently are within the summary criminal justice system in Scotland and will help create a modern, efficient summary justice system, suitable for Scotland. The emphasis is on simple but effective processes which will retain and, I hope, enhance the confidence of the public and take proper account of the needs of victims and witnesses. We have been guided throughout our discussions by the need in any future system to consider the system as a whole and to make the best possible use of the resources available and likely to be available.

These resources are first and foremost the people who work for the criminal justice system at each of its stages – from the police, when crimes and offences are detected or reported, through to social workers and the Scottish Prison Service who have to deal with those who are convicted. A criminal justice system which makes the best use of their talents and their time is likely to be a good system. We believe that our proposals, if implemented, will do that. The criminal justice system also requires considerable financial resources – for the police, the Crown Office and Procurator Fiscal Service, the Scottish Court Service, the Scottish Legal Aid Board, local authorities, lawyers, judges, the courts, criminal justice social work, prisons and agencies which deal with victims, witnesses and offenders. We believe that our proposals will make more effective use of these resources too.

Members of the Committee gave a great deal of their time to the consideration of the many complex and inter-related issues which we have had to consider, not just at meetings of the Committee and its sub-groups but on many other occasions and in many other ways, latterly considering and commenting constructively on drafts of parts or the whole of the report. They brought their considerable but varied experience to bear on the identification of the problems which required to be addressed and how they might be resolved. They did so in an imaginative, forward-looking and impartial way.

The Committee is particularly indebted to our secretariat: Hugh Dignon, Noel Rehfisch and, before him, Steven Macgregor. The range of issues which they have had to investigate has been very wide. The problems which we considered are problems which have arisen elsewhere in the United Kingdom and abroad. The amount of work which was done by them is not apparent from reading the report. Some of the information which we tried to gather simply was not there, though it sometimes took considerable effort to discover that that was so. While the
information which was gathered informed our views, the report refers to those parts of it which survived scrutiny and have been considered worthy of inclusion.

We are indebted too to many others who have done work for the Committee, including assistance with the preparation of this report. Staff of the Crown Office and Procurator Fiscal Service and of the Scottish Court Service provided us with very valuable information which could not have been made available without substantial effort on their part. We had considerable help from statisticians in the Scottish Executive Justice Department, Sandy Taylor in particular. We thank those who carried out formal research at our request. Although we mention them in the report, we are indebted to all those who took the trouble to make representations to us in writing, who attended the practitioners’ workshops which we held and gave us the benefit of their views and experience or who talked to us in the course of our consultations, in Scotland, England, Northern Ireland, the Netherlands and in Australia. I am particularly grateful to Peter Beckingham, the British Consul-General in Sydney, who arranged an invaluable programme of meetings with those whom we most wanted to meet when two of us visited Sydney. Similarly helpful arrangements were made in connection with our visit to Melbourne. The British Embassy in the Hague made faultless arrangements for us to meet those who could be of most assistance to us there as did the Hon. Mr Justice Gillen for our visit to Northern Ireland.

John McInnes

January 2004
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Chapter 1

INTRODUCTION

1.1 In November 2001 the then Minister for Justice, Jim Wallace, announced the membership of a Committee appointed to review summary justice in Scotland under the chairmanship of Sheriff Principal John McInnes.

1.2 Mr Wallace said:

“We want to promote a criminal justice system which is prompt and efficient. The great majority of criminal cases are dealt with in the summary courts and it is vital that they work well.

We need to ensure that the structures we have in place take account of changes in law and changes in society. It is important to ensure that our courts meet public expectations of a modern, efficient and fair justice system.

I am pleased that this review will be taken forward by a Committee which can draw from a depth of expertise and wide range of interests involved in the provision of summary justice.

The Committee has a challenging remit and I look forward to receiving its recommendations for the more efficient and effective delivery of summary justice in Scotland.”

1.3 The formal remit of the Committee was:

“To review the provision of summary justice in Scotland, including the structures and procedures of the sheriff courts and district courts as they relate to summary business and the inter-relation between the two levels of court, and to make recommendations for the more efficient and effective delivery of summary justice in Scotland.”
1.4 The Committee members appointed were:

Chairman
Sheriff Principal John McInnes, QC

Members
Mr Cliff Binning Scottish Court Service
Mr Robin Christie Stipendiary Magistrate, Glasgow District Court
Mr Michael Conboy Commission for Racial Equality
Mr Alistair Duff Law Society of Scotland
Professor Peter Duff School of Law, Aberdeen University
Mr Tom Dysart Assistant Procurator Fiscal, Glasgow
Mrs Phyllis Hands Principal Solicitor, North Lanarkshire Council (District Court)
Mr Tim Huntingford Chief Executive, West Dunbartonshire Council
Sheriff Brian Lockhart Vice-President, Sheriffs’ Association
Mr Jim McColl OBE Chief Executive, Clyde Blowers Ltd
Mr David McKenna Chief Executive, Victim Support Scotland
Mrs Helen Murray MBE Justice of the Peace, Perth Commission Area
Mr George Purcell JP COSLA, Vice Chairman
Chief Constable Chief Constable, Dumfries and Galloway
David Strang QPM Constabulary

1.5 Mr Purcell left the Committee following local authority elections in May 2003. Mr Conboy resigned and was replaced by Mr Chris Oswald, also from the Commission for Racial Equality, in November 2002.

1.6 The Committee met 23 times in formal session, five of which involved 2-day sessions. There were also three sub-groups set up to consider procedure in the courts, alternatives to prosecution, and the administration of the district courts. These sub-groups met on a number of occasions and in addition there were many informal discussions within ad hoc groups of Committee members throughout its deliberations.

1.7 The Committee decided from the outset that they would not see themselves as being representatives of the organisations from which they came and so be bound by any particular organisational viewpoint, but rather as individuals who had been chosen to provide the benefit of their experience. We
decided that it followed that our discussions should be confidential to encourage the free exchange of ideas.

1.8 Many of the discussions within the Committee touched on important principles underlying the way our summary justice system is organised. It was to be expected that there would be debate and discussion on these issues. Members of the Committee recognised that it would not be possible to persuade other members that their detailed solutions should be adopted in all cases. As with all committees, many of the conclusions were reached in a spirit of compromise. The Committee was able to reach full agreement on most issues, but on some the views expressed in this report represent the majority view rather than a unanimous view.

1.9 The Committee decided to proceed by issuing a “first order” consultation document in March 2002 seeking views on the overall structure and aims and objectives of the summary justice system. The Committee received a range of replies, mainly from those involved in the system, and in particular from justices of the peace and organisations involved in the provision of lay justice. The Committee was very grateful to all those who responded. Annex B is a list of those who responded to that consultation. They made many thoughtful and constructive suggestions which the Committee continued to consider throughout its deliberations. The Committee was anxious to broaden this consultation process, and so commissioned a survey of public opinion seeking views on the operation of the summary justice system. This was carried out in January and February 2003.

1.10 The Committee decided to consult on more detailed and technical aspects of the Review by holding a series of practitioners’ workshops. These events, which took place in March 2003 in Edinburgh, Glasgow and Aberdeen, invited a range of those who work within the court system to discuss the emerging proposals, many of which appear in this report. These workshops generated new ideas, confirmed some of the preliminary views of the Committee and caused us to think again about others. We found these workshops very useful. We also held a series of bilateral meetings with the following organisations to discuss those areas where we thought our proposals would be of particular interest. These meetings, which took place throughout 2003, were with:

Association of Chief Police Officers in Scotland
Association of Directors of Social Work
Association of Scottish Police Superintendents
The Summary Justice Review Committee

Convention of Scottish Local Authorities
Crown Office and Procurator Fiscal Service
District Courts Association (court clerks)
District Courts Association (justices)
Glasgow Bar Association
Glasgow Procurator Fiscal’s Office
Law Society of Scotland
Procurators Fiscal Society
Professor Neil Hutton, Strathclyde University
Scottish Criminal Records Office
Scottish Legal Aid Board
Scottish Court Service
Scottish Police Federation
Sheriffs Association
Tayside Police

1.11 We found these to be valuable opportunities to discuss our ideas and were very grateful for the input from all those who attended the workshops and met with us in bilateral meetings.

1.12 In addition to the activities listed above the Committee commissioned several pieces of formal research: a survey of offenders’ views of the summary justice system (conducted by George Street research); a paper comparing the costs of district, stipendiary magistrate and sheriff summary courts (produced by Professor Frank H Stephen of the University of Strathclyde); and a paper by Dr Nancy Loucks outlining a sample of prisoners’ views of the summary justice system. We were grateful to all of those involved in conducting and writing up these pieces of research, which further informed the Committee’s thinking.1

1.13 During the course of the review members of the Committee visited 11 courts in Scotland. Members of the Committee also visited other jurisdictions, including England, Northern Ireland, New South Wales and Victoria in Australia, and the Netherlands. All these jurisdictions have tackled or are tackling problems similar to our own, though in different ways. At all of these places we had helpful and interesting discussions with judges, other lawyers, court officials and policy-makers. We would like to record our thanks to all those with whom we had discussions.

1 Copies of these pieces of research can be found on the Scottish Executive’s Website: www.scotland.gov.uk.
1.14 Over the course of the two years it has taken to produce this report there have been a number of other developments and initiatives aimed at improving the operation of the criminal justice system in Scotland, including:

- the review of the Crown Office and Procurator Fiscal Service (COPFS) carried out by the Scottish Parliament’s Justice 2 Committee and the management review of COPFS – the “Pryce Dyer Report”;
- Lord Bonomy’s 2002 “Review of the Practices and Procedure of the High Court of Justiciary” and the consequent Criminal Procedure (Amendment) (Scotland) Bill currently before the Scottish Parliament as a result;
- Andrew Normand’s report “Proposals for the Integration of Aims, Objectives and Targets in the Scottish Criminal Justice System”;
- the creation of the Sentencing Commission; and
- pilots of various other initiatives including youth courts and the expansion of supervised attendance orders.

We have endeavoured to keep abreast of all such developments since the inception of the Committee and appreciate that some of the changes already made are beginning to have a positive effect. Our recommendations take those developments into account and form an analysis of what still needs to be done to ensure that the summary justice system operates as effectively as it might.

1.15 This report does not attempt to record all the issues that were discussed, nor does it record all the solutions considered and rejected in relation to each issue. We have not recorded, in every case, detailed references for all the evidence we cite. We have adopted that approach in the interests of producing a succinct report which can be read and understood by people who may have no or only limited knowledge of the summary criminal justice system.
Chapter 2

PRINCIPLES, PROBLEMS AND DELIVERY STRATEGIES

Introduction

2.1 Underpinning the Committee’s detailed recommendations is a set of principles, set out here in more detail. We found it useful to test our proposals against this framework, which was consistent with the views on future system management which came from consultees.

Consultation

2.2 To inform our decisions, the first order consultation document sought views on the aims of the summary criminal justice system. It noted that there are a number of key aims common to all justice systems: they should be:

- fair to victims and the accused;
- effective in deterring, punishing and helping to rehabilitate offenders; and
- efficient in the use of time and resources.

2.3 The consultation paper asked if there were, in addition, objectives specific to summary justice – for example, that it should, so far as possible and consistent with the interests of justice, be simple and quick in delivery.

2.4 Consultees generally agreed that the three high level aims appropriate to every justice system should remain priorities. A significant number of responses (57% of the total) also highlighted the need for the system to be quick. This priority was underlined when the consultees were asked to comment on the aspects of the system which they would want to see reformed: most of the consultees who addressed this question focused on the time taken to reach the conclusion of a case. So speed was clearly identified as an agreed priority. Other themes to emerge were:

- simplicity; consultees sought a customer-oriented system easy for users to understand;
- consistency; and
- accountability.
2.5 A substantial minority of consultees also called for a local system of summary justice although it was not always clear whether this referred to accessibility or to community links.

The Committee’s Aims and Objectives

2.6 We agree that fairness has to remain as a key principle, although the criminal justice system has to be fair to victims and witnesses as well as to the accused. The system should be capable of meeting the differing needs of those who come into contact with it – for example, witnesses who are vulnerable, or individuals from an ethnic minority – with equal effectiveness.

2.7 In this context, we feel that it is no longer acceptable for an offender to be able passively to frustrate the interests of justice through inaction. We accept that a basic tenet of fairness – and of ECHR compliance – is that any person must have an opportunity to challenge any decision which is likely to result in the imposition of a penal sanction before a properly constituted, independent and impartial tribunal. When a case is heard before a court it is for the Crown to prove the case; the offender remains innocent until proved guilty.

2.8 But we do not consider it incompatible with fairness to expect an alleged offender to take some active steps to exercise his or her right to a hearing. Provided, therefore, that the offender is duly informed of any action to be taken against him or her, the Committee felt that, in relation to minor penalties not creating a criminal record, it should be for the offender actively to request that the case against him or her be tried in court.

2.9 The Committee felt that achieving effectiveness in the summary justice system required a number of components. Action needed to be taken against offenders as quickly as possible, maintaining the link between action and consequence in an offender’s mind.

2.10 Any action should be sufficient but proportionate. In particular, the system needs to strike a balance between taking action sufficient to achieve deterrence when the law is breached, but not bringing every minor offence within the court system in a way which wastes public resources and is contrary to the public interest.

2.11 Deterrence is at the heart of an effective criminal justice system. But it can only be achieved if any penalty is effectively and consistently enforced: offenders need to know that a penalty will bite. The Committee also noted that public
confidence in the system is undermined if it becomes clear to the wider public that penalties are not enforced; justice has to be seen to be done. Ensuring that penalties can be enforced, therefore, sends a clear signal of intent to the offender but also reassures the public that Scottish justice is effective.

2.12 **Efficiency** - the most effective use of time and resources - is closely linked in our view to other principles, notably that of simplicity. The criminal justice system is a complex one, with a number of different partners with distinct constitutional roles seeking to deliver a joined up service. Efficiency will be best served when:

- cases are dealt with proportionately as soon as possible after they are detected, with referral to the next formal stage in the process (for example, through a police report to the procurator fiscal) only where necessary;
- information flows between partners are as streamlined as possible; and
- the system itself is redesigned (where constitutionally appropriate) to become simpler, clearer and more easily understood.

2.13 **Simplicity** also benefits other court users, particularly when combined with clarity. Procedures should be simple and easily understood by lay people. Plain English should be used consistently but particularly in documents intended to be read by the public. The Committee therefore adopted efficiency and simplicity as key principles.

2.14 The action taken to improve effectiveness and to streamline the system will help to improve the **speed** with which the system operates. The Committee felt that a more summary system was of considerable value; indeed, it regarded speeding up the process of justice as core to what it was trying to achieve. Speedier justice benefits everyone involved in the process, but is particularly helpful to those who find the process most stressful – those who are vulnerable for any reason. It noted, however, the Shorter Oxford Dictionary definition of “summary” in the legal context as being “carried out rapidly by the omission of certain formalities”. It concluded that a balanced approach was required, which promoted speedy disposal by keeping formalities to the minimum required in the interests of fairness, but recognised that there was an irreducible minimum of formality required by any justice system.

2.15 **Consistency** in decision making was also identified by the Committee as a core value. Post code justice is not acceptable. There should be consistency
across Scotland in terms of the level of offending behaviour which brings an individual within the ambit of the criminal justice system and in the type of action taken in relation to similar offences. But this does not necessarily mean inflexibility in the process of how particular breaches of the criminal law should be dealt with, nor in sentencing. The Committee saw sentencing as outwith its remit, but it noted the importance, in relation to minor offenders many of whom may have chaotic lifestyles, of the availability of disposals which meet the needs as well as the deeds of the convicted person. We recommend this view to the Sentencing Commission, which is looking more widely at the issues of consistency in sentencing.

2.16 Another key principle which the Committee’s recommendations sought to underline is that of accountability. The complexity of the system can make it difficult to ascertain where responsibility for shortcomings lies, and therefore difficult to reach a solution. In our view it needs to be clear:

- who takes responsibility for different elements of the system (and this may well be partner agencies working together, rather than one single agency);
- what the success criteria for the system (or parts of the system) are; and
- how, and by whom, effective action can be taken to improve the service when failings are identified.

2.17 Finally, in our view the system of the future should be user-centred rather than service-driven. Partner agencies in the system, operating under continual pressure and relentless public scrutiny, can find it tempting to deliver services in a way which suits their management structure rather than the needs of the service users. We note the welcome shift away from the service-driven approach to one which engages more consistently with local communities and with the needs of specific groups like victims and witnesses.

2.18 The Committee would underline the importance of keeping such a focus consistently throughout the justice system, not just in relation to the most serious cases. Ninety-six per cent of Scotland’s prosecutions are dealt with in the summary courts and critical issues such as:

- clarity of communication (including the use of plain English/avoidance of jargon);
- physical accessibility; and
- sensitive handling of civilian witnesses
matter in summary proceedings as they do in solemn. Throughout our deliberations, therefore, we focused on an approach which sought to check the impact of our recommendations on victims, witnesses and other court users. It is important that they understand the process and can make their views known where appropriate.

2.19 Armed with this set of principles, we took stock of the current state of the summary justice system and assessed its shortcomings against the framework set.

Public Perception

2.20 We do not think that on being asked to review the summary justice system we found a system in crisis. Many of those we consulted took the view that the system had become slow and congested and needed urgent attention, but there were few voices demanding a revolutionary change. This view of the system was borne out by public perceptions as illustrated in the public survey and focus groups commissioned by the Committee.²

2.21 The overall public views of the system could be summarised as follows:

- of those who commented, most thought favourably of the summary courts’ performance;
- cases were seen as being handled, in the main, appropriately and fairly;
- leniency in sentencing was the main criticism levelled at the summary courts;
- most people were confident that the courts ensured that the guilty were convicted and the innocent acquitted;
- most people were not at all confident of the courts’ deterrent value;
- older people were the most sceptical about court performance.

2.22 More specifically, people were asked to provide a judgement, based on what they knew or had heard, on the overall operation of the sheriff and the district courts respectively. In relation to the sheriff courts, over one quarter (27%) of interviewees felt that they could not give an opinion. This percentage was even

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higher at one half (51%) of interviewees asked for an opinion on the district courts. Those most likely to be unable to comment were respondents in the remote rural locations.

**Perceived Overall Performance of Summary Courts**

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<tr>
<th>Rating</th>
<th>Sheriff Court %</th>
<th>District Court %</th>
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<tbody>
<tr>
<td>Very Good</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Good</td>
<td>57</td>
<td>58</td>
</tr>
<tr>
<td>Poor</td>
<td>26</td>
<td>29</td>
</tr>
<tr>
<td>Very Poor</td>
<td>10</td>
<td>7</td>
</tr>
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Sheriff Court Base = 525 respondents  
District Court Base = 357 respondents

2.23 In the case of both courts, exactly the same proportion of people (64%) thought favourably of the courts’ performance. However, overall, one in three of those who responded had an unfavourable perception of the summary courts’ performance. Those with recent experience of the summary courts were more critical of performance (45%) than those without recent contact (33%).

**Confidence in the Summary Justice System**

2.24 There was a degree of confidence that the summary courts were fair in that the guilty are convicted and innocent are acquitted, but a clear view that they were not effective at dealing with re-offending. More detailed analysis of the survey produced a picture of older respondents appearing more sceptical and doubtful than the younger respondents about what the summary courts could deliver in terms of due consideration to the needs of victims and young offenders.

2.25 While we were reassured that there remains a considerable well of public support for the summary justice system, the fact remains that there are serious concerns about the system’s ability to deter re-offending, its capacity to deal with young offenders, its fairness in dealing with victims and overall speed in dealing with cases.
2.26 We take the view that overall speed in dealing with cases is a particularly important aspect. Not only is it the primary focus of our remit – “to make recommendations for the more efficient and effective delivery of summary justice in Scotland” – but it is also our view that improvements in overall speed of the system are likely to deliver significant benefits to victims and witnesses through earlier access to justice and reducing wasted court attendances. It will also contribute to reducing re-offending. Disposals can be more appropriately tailored to fit the offending behaviour the sooner they are made after the offence has been committed, while there is little doubt that delays in the system allow some offenders to believe there is no effective sanction against their behaviour, which is thus likely to continue unchecked.

2.27 We were keen to ascertain just how quickly or otherwise the system does in fact operate, but were surprised to find no satisfactory measure of the overall time taken. There are SCS (Scottish Court Service) figures which indicate that in the 12 months up to August 2003, around 20% of sheriff summary cases had not been disposed of within 20 weeks of their first calling in court, but these take no account of the time lapse between the offender coming to the attention of the police and his or her first court appearance.

2.28 We had access to a Crown Office exercise conducted in 1997 that measured the time taken to process cases from their report to the procurator fiscal to disposal. There was no other comparable data, and so we asked the Crown Office to assist us with a similar exercise with the aim of comparing the
sets of data. This exercise is considered in more detail in chapter 33 but it is sufficient to note at this point that there does in fact appear to have been a deterioration in the time taken to deal with cases in the 6 years since 1997. In 1997 the peak of cases disposed in the sheriff court was 8-9 weeks; in 2003 the peak was 11 weeks. In the district court it was 9 weeks in 1997, 10 weeks in 2003.

2.29 We were also particularly concerned that the overall time between the offender being charged and final disposal was not routinely measured. The exercise the Crown Office and Procurator Fiscal Service helpfully conducted for us, as well as measuring the time between the case being reported by the police to the fiscal and disposal, also showed that in 2003 significant numbers of cases – 24% in the sheriff court and 16% in the district court – had not been disposed of 50 weeks after the offender had committed the offence. That exercise showed that the numbers of cases and the percentages of the cases disposed of within given periods between the date of the offence and the date when the case last called in court, i.e. the date of disposal, were as follows:

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<tr>
<th></th>
<th>By 10 weeks</th>
<th>By 15 weeks</th>
<th>By 25 weeks</th>
<th>By 50 weeks</th>
<th>By 75 weeks</th>
<th>By 100 weeks</th>
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<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
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<td>%</td>
</tr>
<tr>
<td>District Court</td>
<td>621</td>
<td>6</td>
<td>1,433</td>
<td>14</td>
<td>4,657</td>
<td>45</td>
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<tr>
<td>Sheriff Court</td>
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<td>17</td>
<td>4,995</td>
<td>26</td>
<td>7,764</td>
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2.30 In our view, and in that of most of those who responded to our initial consultation, a system which fails to dispose of over half of all cases within 6 months of the date of offence cannot truly be considered to be summary. We believe there are many reasons for the slowness of the system which we address in subsequent chapters of this report. We noted, for example, that there was little differentiation in the way cases were handled by the system. All cases, whether serious or minor, tend to follow the same trajectory in terms of reporting, prosecution, adjourned diets and eventual disposal, overloading the system and adding to delay. We were unable to find any incentives at work that might encourage the efficient handling of business; in fact those that were possible to identify appeared to work in the opposite direction. There appeared to us to be clear incentives for the accused to delay cases in the hope that witnesses would forget details of the relevant event or become indifferent to the outcome of the case and not turn up to give evidence at trial, or that the prosecution would
simply give up and desert the case in order to concentrate its resources on more recent cases. Anecdotal evidence from many courts suggests that this is common practice and that it succeeds in getting complaints or parts of complaints dropped.

2.31 During the course of the review we visited a number of different courts as well as accumulating large amounts of data on how the system was administered throughout Scotland. We were struck by the lack of consistency. This was reflected in structural aspects such as the varying levels of district court accommodation, ranging from new and purpose built to, frankly, dilapidated. There were also inconsistencies in the way almost all agencies dealt with summary business; for example, the time taken for the police to report cases to the procurator fiscal varies from 89% within 7 weeks in the best performing force in this respect to 35% within 7 weeks in the worst. Cases marked no proceedings by the procurator fiscal range from 6% of cases reported in some areas to 25% in others. There is also wide variation in the management of cases once they get into the courts’ systems. In the sheriff courts, intermediate diets dispose of 17% of cases in some areas and 40% in others, while of those cases which continue to the trial diet over 50% plead guilty on the day in some courts and less than 20% in others. Some, but not all, of these inconsistencies can undoubtedly be explained by particular circumstances, but nevertheless we are clear that there is scope for a significant improvement.

2.32 We were concerned that the system was perceived to be ineffective by many of those that work within it. The police, for example, expressed their disquiet to us about what they see as the high numbers of cases marked no proceedings by procurators fiscal – the overall figure for 2002-3 was 17% of reported cases. The procurators fiscal we spoke to often commented that they might make more use of alternatives to prosecution, in particular the fiscal fine, but for concerns that they would not be effectively enforced – that in some areas offenders are in practice paying a single £5 instalment in the confident knowledge that little further can or would be done to pursue the matter. For those offenders who are fined in court, but who cannot or stubbornly refuse to pay, there is the sanction of imprisonment. But here also we were told that many offenders are aware of how to play the system, so that very short stays in prison, maybe of only a single night, can discharge outstanding fines, but at significant cost to the Scottish Prison Service in dealing with these receptions.
2.33 We also had some concerns about the value for money obtained from some of the expenditure in the system. For example, we were told by the Scottish Legal Aid Board that a recent analysis of a sample of cases showed that of all those individuals who receive full summary legal aid on the basis that they had pled not guilty, only 17% of these cases actually proceeded to the trial hearing. Another statistic which caused us concern was that, in the year up to the end of August 2003, 71% of trials were adjourned at least once and 29% of trials were adjourned twice or more. This causes immense waste of public funds – in terms of court, prosecution and defence costs – as well as considerable inconvenience to victims and witnesses as well as criminal justice professionals.

2.34 As has already been said, we do not wish to overstate the case and assert that the system is in crisis. Nevertheless we think that the summary justice system is in need of a comprehensive overhaul and a move to focus on active management of it as a whole rather than of its constituent parts. In this respect we welcome the recent report by Andrew Normand CB (now Sheriff Normand) with its proposals for Criminal Justice Boards to address corporate performance issues.

2.35 The Committee’s proposals seek to remedy the difficulties identified in a way consistent with the principles set out earlier.

2.36 The next main sections of the report deal with the issues of system structure. We were unanimous that unification of the summary court system would be conducive to greater consistency and simplicity, as well as long-term efficiency. The Committee also recommends (a minority dissenting – see annex A) that a unified summary court in which all cases were heard by a professional judge would further contribute to a simpler and more consistent system, while also saving money by enabling the most flexible use to be made of court resources.

2.37 The bulk of the Report deals sequentially with the way in which the system operates from the point at which an alleged crime or offence is detected. A number of strategies identified here are common to each stage of the process: for example, the Report recommends throughout the most effective use of modern technology to streamline communications between agencies and to improve information flows.

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3 Figures supplied by Scottish Court Service.
2.38 Picking up the principle that effective action is quick action, the Committee makes a number of recommendations to ensure effective action can be taken as quickly as possible against breaches of the criminal law. Proposals to extend diversions from prosecution by the use of recorded police warnings, the extension of police fixed penalty notices (FPNs) a wider range of fiscal fines (more effectively enforced) and new fiscal compensation orders are intended to offer a range of proportionate responses ensuring that sanctions can be imposed for minor breaches of the criminal law.

2.39 Once a case is reported to the procurator fiscal and a decision has been taken to prosecute, the Report makes a number of proposals designed to speed up prosecution without loss of fairness to the accused. Some of the key elements in that strategy are:

- getting an accused to court as soon as possible after charge;
- encouraging early pleas of guilty by ensuring that the defence is informed as early as possible of the evidence against the accused;
- more effective use of intermediate diets; and
- more effective use of the trial stage, including scope for trial in absence.

2.40 Delay is also evident when appeals are lodged following completion of the trial process. To reduce the overload on the High Court of Justiciary, the report recommends the creation of a new summary appeal court for summary sentence appeals, chaired by the sheriffs principal.

2.41 As noted above, effectiveness in the criminal justice system is closely linked to enforcement. Most penalties imposed in the summary criminal system are financial ones. The report therefore analyses in some detail flaws in the current enforcement of financial penalties and proposes a centralised system for enforcing fines and other penalties with effective sanctions.

2.42 Finally, the report looks at the issues of accountability - how can success be measured and how, in a complex system, can the stakeholder organisations take joint ownership of joint targets? We suggest some of the key success criteria which should be measured and recommend that the National Criminal Justice Board, on which the key stakeholders are represented, should take the lead in finalising them and then monitoring the success of changes once they are implemented.
Chapter 3

SUMMARY OF RECOMMENDATIONS

Note: references to “the 1995 Act” are references to the Criminal Procedure (Scotland) Act 1995, the main Act governing summary criminal procedure in Scotland at present. References in brackets after each recommendation relate to the chapters or paragraphs of the report considering that recommendation in more detail.

A UNIFIED SUMMARY COURT SYSTEM

1. We recommend the unification of the administration of the summary courts under the Scottish Court Service. (5.6 – 5.42)

2. We recommend that discussions on implementation of this proposal between the Scottish Executive and COSLA should begin as soon as possible. (5.42 – 5.46)

ALIGNMENT OF BOUNDARIES

3. We recommend that the opportunity presented by restructuring the summary court system should be used to ensure that sheriff court districts are, so far as is practicable, co-terminous with police and procurator fiscal operating areas and with local authority boundaries. (6.1 – 6.5)

4. We recommend that any consequent re-definition of sheriffdom boundaries should, so far as is practicable, be aligned with police and Crown Office and Procurator Fiscal Service (COPFS) operating areas and with local authority boundaries. (6.6)

5. We recommend that any future review of local government, police, COPFS or court boundaries should provide for full consultation with all justice system interests. (6.7)

JUDGES IN THE SUMMARY COURT

6. Following on from Recommendation 1, a large majority of the Committee recommends that we move to a system that employs only professionally qualified
judges. A minority on the Committee takes a different view and have submitted a separate dissent (annex A) to that effect. (7.1 – 7.73)

7. We recommend that there should be a new class of professional judge to deal with summary business where there is a need. That judge should be known as a “summary sheriff”. (7.74 – 7.83)

8. We recommend that while summary sheriffs would normally be based in a given locality, they would not necessarily be limited to a particular local jurisdiction, and could be used flexibly to relieve pressure in other areas. We recommend that some might be appointed on a part-time basis. (7.95)

9. We recommend that the criminal jurisdiction for judges in summary cases should be a maximum 12 months detention or imprisonment and a £20,000 fine. There is no reason for a distinction in this respect between sheriffs and summary sheriffs. (7.84 – 7.93)

10. We recommend that consideration be given to summary sheriffs having some civil jurisdiction in addition to the criminal jurisdiction we have suggested. (7.96)

OPTIONS FOR THE POLICE IN RELATION TO MINOR CASES WHICH DO NOT REQUIRE TO BE REPORTED FOR PROSECUTION

11. We recommend that the police make full use of non-reporting options, and that guidance be issued by the Lord Advocate extending the types of offences which may be dealt with by the police on an informal basis. (8.1 – 8.4)

12. We recommend that there ought to be reasonable consistency across the country in relation to types of case which the police are directed not to report. We recommend that the proposed criminal justice boards should address this issue. (8.6 – 8.11)

13. We recommend the introduction of a system of formal recorded police warnings. These warnings should not require an admission of guilt. They should be accessible to police and procurators fiscal for a period of not less than 2 years and not more than 5 years from the warning. They should not be referable to in court proceedings. (8.12 – 8.20)
FIXED PENALTY NOTICES

14. We recommend that consideration be given to increasing the scope of FPNs to a number of non-road traffic offences. The scope for extending the use of FPNs to other statutory offences, particularly those of a regulatory nature, should be explored. (9.1 – 9.13)

15. We recommend that, in a subsequent prosecution for a similar offence, the Crown should be able to refer to previous FPNs that have been imposed in relation to similar offences committed by the accused within a certain period in the past – not less than 2 years and not more than 5 years. (Ch. 9)

16. We recommend that when a case is disposed of through the offer of a FPN the disposal of the case should be disclosed to any person having a legitimate interest in knowing its outcome on request – for example, the victim. (9.18)

17. We recommend that it should be necessary for the person to whom an FPN is issued to take positive action, if he or she wishes to contest the issue in court. If that person chooses to do nothing, the FPN will become a registered fine on the lapse of a fixed period. (9.15)

18. Further, we recommend that all unpaid FPNs which are registered as fines should be registered at the sums shown on the FPN with a 50% increase. (9.15)

19. We recommend that, where an accused is convicted having declined the offer of a FPN, the court should be advised of the amount of the offer made and declined and that the court may take this into account when imposing sentence. (9.17)

20. We recommend that fixed penalty notices be redrafted so as to set out the rights and obligations applying to them in clear terms. (Ch. 9)

REPORTING TO THE PROCURATOR FISCAL

21. We recommend that the obligation to prepare full police reports for submission to the procurator fiscal in every case be reviewed as it is not an effective use of police time. We believe there is scope for abbreviated reports to be prepared in a range of cases and note the recommendation in the ACPOS/COPFS joint protocol on police reports on this matter. We suggest that the use of abbreviated reports be kept under review by criminal justice boards to ensure that the most effective use is made of police and COPFS resources. (10.1 – 10.9)
22. We recommend that steps are taken to ensure that custody cases are dealt with earlier in the court day. We recommend that the police, procurators fiscal and courts work together closely to identify ways of speeding up the process – and that their joint efforts be monitored by local criminal justice boards. (10.15 – 10.20)

23. We recommend discussion between the Crown Office and Procurator Fiscal Service, COSLA and other specialist reporting agencies on what needs to be done to secure the consistently effective prosecution of environmental and other similar regulatory offences. (10.21)

ALTERNATIVES TO PROSECUTION

24. We recommend that alternatives to prosecution should be made more widely available, more flexible and more robust, to enable the courts to focus on more rapid handling of serious crimes and offences while giving police and procurators fiscal the range of powers they need to respond quickly and appropriately to minor offences. (Ch. 11)

25. We recommend that the Executive considers increasing the scope of fiscal fines from £100 to either £200 or £500 – increasing the range of cases in which they could be used and bringing fiscal fine levels closer to that of court fines. (11.35 – 11.42)

26. We recommend that non-acceptance of a fiscal fine offer may be disclosed to a court in connection with any prosecution for the offence alleged, and also that acceptance of an offer may be disclosed to any court in connection with any other current or subsequent proceedings commencing within a period of not less than 2 and not more than 5 years. (11.11 – 11.17)

27. We recommend that information relating to fiscal fines accepted should be available to the police and fiscal so that their consideration of the action to be taken when someone re-offends can be taken in the light of all the facts. (11.16)

28. We recommend that, if fiscal fines are to be used more widely, difficulties relating to enforcing their payment should be addressed. (11.18 – 11.30)

29. We recommend that the calculation of time bar should be suspended for the period between the offer of a fiscal fine and notification as to whether the offer has been accepted or not. (11.26)
30. We recommend that, as with FPNs, it should be necessary for the person to whom an offer of a fiscal fine is issued to take positive action if he or she wishes to contest the allegation. In other words, to “opt-out” of the fixed penalty scheme or fiscal fine or compensation offer, he or she should be required to complete and return a form indicating that the fine is to be contested. (11.21 – 11.29)

31. We recommend that, as with FPNs, if the offender chooses to do nothing, the fiscal fine offer will become registered as a fine on the lapse of a fixed period. (11.21 – 11.29)

32. We recommend that, as with FPNs, all unpaid fiscal fines which are registered should be subject to a 50% increase. (11.21 – 11.29)

33. We recommend that a procurator fiscal should be able, in conjunction with or separate from a fiscal fine, to impose a compensation order on an alleged offender. We recommend that in parallel with s250 of the 1995 Act, the procurator fiscal should prefer a compensation order where an offender’s means appear to be insufficient to pay both a fiscal fine and a fiscal compensation order. (11.43 – 11.57)

34. Guidelines on the use of compensation orders should be produced. The guidelines should, as far as possible, be publicly available. (11.56)

35. We recommend that both the courts and the procurator fiscal should be given power to make a compensation order where the victim of offending behaviour has been subjected to behaviour which is frightening, distressing, annoying or has caused nuisance or anxiety. (11.53 – 11.54)

36. We recommend that fiscal compensation orders should have no prescribed upper limit. (11.57)

37. We recommend that the arrangements for enforcement of fiscal compensation orders should be the same as for fiscal fines/FPNs. (11.55)

SAFEGUARD AGAINST OPT-OUT PROCEDURES

38. We recommend that a safeguard mechanism should be introduced to avoid injustice in relation to FPNs, fiscal fines and fiscal compensation orders where, for example, they have been wrongly issued or the person to whom one was issued was unaware of it having been issued and wished to contest it in court or to
contend that no surcharge should be added for non-payment within the prescribed time. (11.25 – 11.27)

OTHER DIVERSION FROM PROSECUTION SCHEMES

39. We received very positive feedback from sentencers, procurators fiscal and social workers about the value of diversion schemes and recommend that effective schemes be made available nationally. We note, however, that little has been done to evaluate the costs and benefits of diversion schemes compared with other types of disposals. (11.58 – 11.60)

40. We recommend that steps should be taken to ensure that, where a scheme has proved to be successful, it is available consistently across the country. (11.58 – 11.60)

BETTER COMMUNICATION BETWEEN PROCURATORS FISCAL AND POLICE AT AN EARLY STAGE

41. We recommend that the police and COPFS should put in place arrangements for better communication and closer co-operation between them in relation to less serious cases. (Ch 12)

42. We recommend that the police and COPFS try out various different local arrangements for improved informal communication, to enable decisions to be taken as early as possible on whether and how a case should be taken forward and to improve standards of case preparation. An example of such an arrangement would be the location of a procurator fiscal in a main police station. (12.1 – 12.14)

43. We recommend that the Executive should pilot the co-location of police officers in COPFS offices. (12.15 – 12.16)

UNDERTAKINGS TO APPEAR IN COURT

44. We recommend that in the great majority of cases in which a summary prosecution is likely, the accused, if not detained in custody, should sign an undertaking to appear at a particular court on a particular date, and at a particular time. We recommend that this be introduced in phases. (Ch 13)
45. We recommend that the first phase should include, as a broad category, cases to be identified by Lord Advocate’s guidelines, with a second phase encompassing all cases dealt with in police stations. (13.12)

46. We recommend that, as a third phase, consideration should be given to the introduction of a system of undertakings completed by police officers elsewhere than at a police station. (13.13)

47. We recommend that police officers be given access to slots in court diaries within the next 3-4 weeks to allow them to fix times suitable to the court for accused persons to appear on an undertaking. (13.4)

48. We recommend that where an accused has been released on an undertaking procurators fiscal should retain the option of determining that there should be an alternative disposal, such as diversion or fiscal fine, or no proceedings and, if so, should be able to cancel the requirement to appear. (13.5 – 13.7)

49. We recommend that it should be possible for the case to be continued for further investigation or for consideration of diversion or offer of fiscal fine on the strength of the undertaking without a complaint being served. (13.7)

ENCOURAGING EARLY PLEAS

50. We recommend that the prosecution should make available to the defence solicitor sufficient information to allow the latter to advise the accused of the strength of the case against him or her at an early stage of the process. Where the accused is unrepresented the material should be passed directly to him or her. (14.1 – 14.5)

51. We recommend that a summary of the evidence be provided to the accused along with the copy of the complaint. (14.1 – 14.5)

52. We recommend that defence solicitors should be properly remunerated for work done at an early stage of a case and be able to obtain reasonable remuneration for work for legally aided clients pleading guilty at this stage. (14.6 – 14.11)

53. We recommend that the summary criminal legal aid scheme should be amended to remove the current incentive to plead not guilty, to encourage the early resolution of cases and to discourage the maintenance of pleas of not guilty
until relatively late in the proceedings in cases which the trial is not likely to proceed. (14.6 – 14.11)

54. We recommend that there should be an incentive in terms of a probable sentence discount to encourage early pleas of guilty. (14.12 – 14.21)

55. We recommend that in the generality of cases a court should not allow any discount of sentence for a plea on the day of the trial or during the trial. (14.12 – 14.21)

56. We recommend that, as far as summary cases are concerned, section 196(1) of the 1995 Act, which enables sentencers to take into account the stage at which a guilty plea is tendered in considering the award of a sentence discount, should be amended by changing “may” to “shall”. (14.12 – 14.17)

57. We recommend that sentencers be required to state in court whether they have given a sentence discount and the amount of that discount and that the court should be required to minute that. (14.18)

58. We recommend that where a sentencer does not give a discount, that fact should also be stated in court along with the reasons for allowing no discount and that the court should be required to minute that. (14.18)

59. We do not recommend at this stage that there should be a prescriptive scheme with detailed guidance as to levels of discount. (14.19 – 14.21)

ELECTRONIC COMPLAINTS

60. We recommend that the principal copy of the complaint, minutes and the like should be the electronic version, on the assumption that technical and security issues can be satisfactorily resolved. (Ch. 15)

61. We recommend that copies of complaints, minutes, etc. which are printed out should be regarded as copies for use by the court, the accused or the Crown. (Ch. 15)

62. We recommend that an accused or his or her solicitor should be able to inspect the electronic originals of such documents as of right. (Ch. 15)
DEALING WITH MULTIPLE CASES AGAINST AN ACCUSED

63. We recommend that, where possible, all outstanding complaints against an accused should be dealt with in the same court, in most cases preferably the court in whose jurisdiction the accused lives. (Ch. 16)

64. We recommend that when there are cases outstanding against the same accused the Crown or the defence should be able to apply to have cases transferred to or from a particular court so as to bring the outstanding cases together in the same court. (16.1 – 16.6)

65. We recommend that the court should have power to direct such transfers at its own hand, having heard the Crown and, if present, the defence. (16.7)

66. We recommend that the court should have power, on Crown, defence or joint motion, to conjoin complaints and direct that they be treated as one for the purposes of trial. (16.9 – 16.10)

67. We recommend that for the purposes of sentence each complaint be dealt with separately and should remain subject to its own maximum. (16.11)

68. We recommend that the law be changed to enable all previous convictions to be taken into account irrespective of whether the offences were committed prior to or subsequent to the offence under consideration. (16.14)

69. We recommend that where cases are transferred from one court to another the transfer should be carried out electronically; it should not be necessary to complete the physical transfer of hard copy documents before the receiving court can start dealing with the case. (16.8)

DISCLOSURE OF PREVIOUS CONVICTIONS PRIOR TO CONVICTION

70. We recommend that section 101(3) of the 1995 Act should be amended in respect of summary cases to allow all charges arising out of the same incident or on the same occasion to be included on the same complaint and to go to trial at the same time, even though one or more of the charges discloses a previous conviction. (Ch. 17)
PRIORITISATION OF CASES

71. We do not have any general recommendation to make as to the prioritisation of some types of case over others. (Ch. 18)

72. We recommend that prioritisation should remain the responsibility of COPFS. (Ch. 18)

73. We recommend that efforts to speed up the system as a whole should take precedence over prioritisation of some types of case and over the introduction of further specialised courts. (Ch. 18)

CITING WITNESSES

74. We recommend that the operation of the new protocols for ACPOS/Crown handling of witness citation should be carefully monitored to establish whether they deliver timely and efficient witness citation. (19.1 – 19.9)

75. We recommend that detailed consideration be given by COPFS, in liaison with the police, to establishing a national centralised system (though not necessarily a national agency) for the citation and countermanding of witnesses, making best use of IT. (19.10)

76. We recommend that when a trial is adjourned witnesses present at the trial should be re-cited for the adjourned trial before they leave the court, leaving only those who did not attend to be re-cited formally by post or in person. (19.11 – 19.12)

77. We recommend that the police routinely obtain the home and work address, the home, work and mobile telephone numbers and home and work e-mail addresses of either accused or witnesses so far as that person has such means of contact, for the purpose of providing information and countermanding witnesses. (19.14)

78. We recommend that, provided a satisfactory system of proof of receipt is put in place, it should be competent to cite a witness by e-mail, where an e-mail address has been provided. (19.13)

79. We recommend that legislation should provide that failure to comply with a reasonable request by a police officer for citation details should become an offence. (19.15)
INTERMEDIATE DIETS

80. We recommend that intermediate diets should continue, that they should be made more effective and that judges should receive additional training in the management of them. (Ch. 20)

81. We recommend that section 148(2) of the 1995 Act be amended so that there is not a presumption that a trial will be adjourned. (20.14)

82. We recommend that section 148(4) of the 1995 Act be amended so that the bench may ask any questions relevant to the identification of the issues which will be in contention at the trial with a view to minimising the number of witnesses required to attend the trial. (20.15 – 20.16)

83. We recommend that either party should be given the right to challenge the refusal of the other party to accept the evidence of a witness as non-contentious and seek a court direction on the matter. (20.23 – 20.29)

84. We recommend that in such circumstances, if the evidence of a witness appears to the court to be non-contentious and if the signed statement of that witness provided to the court appears to cover all material issues to which that witness is likely to be able to speak, the court may, having heard both parties, direct that that statement shall be admissible evidence in the case without the witness having to speak to it. (20.26 – 20.27)

85. We recommend that where such a direction has been made, the party who did not accept that the evidence was non-contentious may cite the witness to the trial. (20.28)

86. We recommend that in such circumstances, both the statement of the witness and his or her oral evidence should be admissible evidence at trial. (20.29)

87. We recommend that at the intermediate diet the court should seek confirmation that the accused has been made aware that a sentence discount is likely to be available for a plea of guilty at that stage but is unlikely to be available at the trial. (20.34)

88. We recommend that statutory and common law special defences should be intimated no later than the intermediate diet or any adjournment of that diet. (20.21)
89. We recommend that not more than about 30 intermediate diets should be set per part court day. (20.4)

WITNESS STATEMENTS

90. We recommend that for all cases in which a summary trial has been fixed full signed witness statements should be prepared by the police. (21.1 – 21.3)

91. We recommend that section 258 of the 1995 Act be clarified to confirm that the Crown and the defence may serve a statement (of the kind referred to in that section) relating to the signed witness statements of witnesses whose evidence is considered unlikely to be disputed and that unchallenged witness statements should be the evidence of the witnesses concerned. (21.4)

92. We recommend that similar provision be made to deal with other types of non-contentious evidence; for example, the provisions for routine evidence in sections 280 and 281 of the 1995 Act. (21.5 – 21.11)

93. We recommend that the time limits in sections 258, 280, 281, etc. for the service of a notice of uncontroversial evidence or routine evidence of 14 days before trial be changed to 7 days before the intermediate diet where the accused is in custody and 14 days where he or she is not. (21.10)

94. We recommend that conditions be prescribed which, if satisfied, would make a signed witness statement potentially admissible in evidence. (21.5 – 21.11)

95. We recommend that a statement made by a witness to a police officer which is recorded verbatim and read over to the witness and signed by him or her should be admissible in court without being spoken to by a witness where it is agreed between the parties that the statement shall be the evidence of that witness, where such a statement has not been challenged under section 258 procedure revised as proposed, or where, having heard both parties, the court has directed at the intermediate diet that the statement shall be admissible evidence in the case. Such statements should be read aloud to the court in the course of a trial as admissible evidence of the facts to which the witness attests. (21.5 – 21.11)
PRODUCTIONS FOR SUMMARY CRIMINAL CASES

96. We recommend that the need for the police to retain productions with a view to trial should be reviewed with the aims of clarifying the law, e.g. by legislative change or the provision of guidelines, and reducing the amount and types of property which it is necessary to retain for possible production at a trial. (Ch. 22)

EVIDENCE OBTAINED USING VIDEO TECHNOLOGY

97. We recommend that video recordings of the process of cautioning and charging suspects should be regarded as routine evidence. (Ch. 23)

98. We recommend that, where there is CCTV evidence or other recorded evidence of events as they happened, it should be made possible to lead that evidence without it being necessary for a witness responsible for making, monitoring or obtaining the recording to attend court to speak to it, such as a police officer or a CCTV operator. A letter or certificate from the relevant organisation as to the provenance of the evidence should suffice. (Ch. 23)

99. We recommend that video evidence of witness statements should be treated in the same way as signed witness statements in relation to the procedure for such evidence to be agreed as uncontroversial. Where such evidence is either agreed to be uncontroversial or the court so directs it should be admissible evidence in the case. The Crown or the defence should be able to use that evidence without it being necessary for one or more witnesses to speak to it. (Ch. 23)

TRIAL COURTS

100. We recommend that individual courts experiment with different court programmes to see what works best in that court to achieve optimum efficiency. Optimum efficiency must take account of the needs of all court users, including victims and witnesses. (Ch. 24)

101. We recommend that there should be no call-over of trials (i.e. to determine whether the accused and witnesses are present and whether the trial will proceed) after the time when the first trial is due to start and that there should be
no adjournments after that time to discuss pleas in cases in which the trial has not commenced. If there is to be a call-over, the court should sit earlier for that purpose. (24.2 – 24.4)

102. We recommend that the first trial should start when it is due to start and that the court should refuse all adjournments except of trials which cannot, in the interests of justice, commence at all. (24.3)

103. We recommend that courts be given targets for the time which elapses between the time when both accused and witnesses are required to arrive at court and the time at which the case in which accused are involved commences and, in the cases of witnesses, the time when the witness gives evidence. We recommend that courts should aim to require the attendance of witnesses at court no more than an hour or so on average before they are required to give evidence. (24.5 – 24.7)

TRIAL IN ABSENCE

104. We recommend that trial in absence should be competent whether the accused has been charged with a common law crime or a statutory offence and whether or not the crime or statutory offence is punishable by imprisonment. (Ch. 25)

105. We recommend that trial in absence should only take place if the court is satisfied that the accused has received notice that he or she is required to attend trial at a particular time and that if he or she fails to do so the trial may or will proceed in absence. (25.1 – 25.7)

106. We recommend that trial in absence should be competent where any counsel or solicitor instructed in the case withdraws. (25.9 – 25.11)

107. We recommend that the court should not be required to appoint a solicitor when the accused is unrepresented but should have power to do so. (25.9 – 25.11)

108. We recommend that it should be made competent to establish the identity of an offender by photographic evidence where identity is in issue. (25.12 – 25.13)

109. We recommend that following trial in absence, a court should have power to impose fines, and make compensation orders, supervised attendance orders
instead of fines, exclusion orders (from licensed premises) and non-harassment orders. (25.14 – 25.15)

110. We recommend that it should not be competent to impose sentences of imprisonment or sentences which require the consent of the accused in the absence of the accused. (25.16 – 25.17)

111. We recommend that a provision be introduced in Scotland along the same lines as section 142 of the Magistrates’ Act 1980 in England and Wales, which provides that the court may vary or rescind a sentence or other order made when dealing with an offender and may order a rehearing of the case if it appears to the court to be in the interests of justice to do so. (25.18 – 25.19)

THE ROLE OF THE BENCH IN MANAGING COURT BUSINESS

112. We recommend that the Judicial Studies Committee provide further training for judges in the management of summary court business. (26.16 – 26.17)

113. We recommend that management information should be provided to judges on a court by court basis at regular intervals showing the extent to which there is deviation from the mean in relation to the number of adjournments granted at the various states of the process, the overall time taken to deal with cases and the implications for witnesses, victims and accused. (26.13 – 26.15)

ALTERATION OF DIETS

114. We recommend that consideration should be given to repealing or amending section 137(2) of the 1995 Act (requirement on the court to postpone a case on the joint application of the prosecutor and accused unless there has been unnecessary delay on the part of one or more of the parties). If it is thought necessary to retain that sub-section it could be amended to specify that applications for postponement of a case should state in cogent terms the reasons why postponement is sought. (Ch 27)

SENTENCING INFORMATION SYSTEM

115. We consider that a sentencing information system would have benefits in furthering consistency in sentencing and reducing the phenomenon of “sheriff shopping”, thereby encouraging more early pleas. We recommend that this issue be examined further by the Sentencing Commission. (Ch 28)
116. We suggest that a sentencing information system for summary courts could use, so far as possible, the software developed for the current High Court system. We suggest that the software be modified so that access can be made available to COPFS and to defence lawyers. They should be able to gain access to all the data other than the identity of the judge who dealt with a particular case. (Ch. 28)

SOCIAL ENQUIRY REPORTS

117. We recommend the removal of the compulsion upon the court to obtain a new Social Enquiry Report (SER) prior to sentence in the circumstances currently prescribed, where a report which has been produced in the last 3 months is available. The option of obtaining a new report in these circumstances should be retained. (29.1 – 29.4)

118. We recommend that social workers be provided with a short summary of the evidence against an accused (similar to that which would be provided to the accused with the complaint) along with a copy of the complaint and details of the accused’s previous convictions to assist in the production of accurate SERs. (29.6)

119. We recommend that it should not be necessary for a court to obtain a social enquiry report if the court is satisfied that, having regard to the sentence likely to be imposed by it, the obtaining of such a report would serve no useful purpose. (29.1 – 29.4)

COURT SITTING HOURS

120. We do not make any recommendation for the regular extension of court hours. (Ch. 30)

121. We recommend that courts should have responsibility for making the best use of the resources available to them. In doing so they should consider adjusting their hours of sitting to suit local circumstances. This is a matter which local criminal justice boards may wish to consider in more detail. (Ch. 30)

SUMMARY APPEAL COURT

122. We recommend that there should be a summary criminal appeal court. (Ch. 31)
123. We recommend that the summary appeal court should hear all summary appeals against sentence. Provision should be made for the summary criminal appeal court to refer any appeals which raised questions of law or of sentencing principle of wider application to the High Court of Justiciary. (31.12)

124. We recommend all appeals involving conviction or acquittal or lenient sentence should continue to be marked to the High Court of Justiciary. It should be open to judges of the High Court carrying out a sift of such cases to direct that the case be dealt with by the summary criminal appeal court. (31.13 – 31.16)

125. We recommend that the summary criminal appeal court hearing sentence only appeals, in which leave has been granted, should sit as a bench of two but, in the event of disagreement or where a point of importance arises, should sit as a bench of three. (31.16 & 31.19)

126. We recommend that the judges for the summary appeal court should be drawn from the shrieval bench. We envisage sheriffs principal being part-time members of the court. We also envisage that a number of experienced sheriffs would be appointed as part-time members of the court for a term of years, possibly 3 years, which might be renewed. Such sheriffs should have held office as such for a minimum period of years, possibly 5 years, prior to their appointment as members of the summary criminal appeal court.

127. We recommend that overall responsibility for the operation of the summary appeal court should be in the hands of a single sheriff principal, who would be appointed to that role on a part-time basis for a term of years, possibly 3 years, and that this appointment could rotate between sheriffs principal. (31.9 – 31.11)

128. We recommend that the summary appeal court should be peripatetic. Appellants could be represented by their own solicitors in a relatively local court. (31.17 – 31.18)

129. We recommend that provision should be made for the Scottish Legal Aid Board (SLAB) to scrutinise the merits of summary appeals before legal aid is granted for them. (31.21 – 31.22)
FINE ENFORCEMENT

130. We recommend that the Executive should take responsibility for fine enforcement away from individual courts and bring it together within a single delivery organisation – which could be a separate arm of the Scottish Court Service or a free-standing public sector organisation. (Ch. 32)

131. Wherever practicable, financial penalties which carry an ultimate criminal sanction, should be collected and enforced by the new agency, which would have a variety of new powers. (Ch. 32 – 32.46 in particular)

132. We recommend that the Executive should explore with the Department of Work and Pensions the options for making the deduction from benefits scheme operate more effectively in Scotland. (32.47 – 32.48)

133. We recommend that the Executive should consider how arrestment of earnings orders might be better used as a means of fine enforcement. (32.49)

134. We recommend that a thorough examination of the unit fines system should be undertaken in the context of the revised approach to Summary Justice proposed in Scotland. (32.50)

HOW WILL WE KNOW WHETHER THE CHANGES WE RECOMMEND ARE WORKING?

135. We recommend that more information be collected about the time taken to handle not just those cases in which there is a prosecution but different populations of cases – for example, those in which warnings are issued, fixed penalties and fiscal fines are offered, and cases marked “no proceedings”. (33.1 – 33.13)

136. In relation to cases diverted from prosecution, we recommend that the National Criminal Justice Board should consider what further information needs to be collected in order that sensible time targets can be set. (33.14)

137. We recommend that the National Criminal Justice Board should seek to identify quality controls and targets which in combination will help to eliminate those factors which this report identifies as leading to wasted effort on the part of one or more agencies. (33.15 – 33.18)
138. We recommend that there should be a clear process within the system for determining the most relevant performance information and for generating it on an area by area and/or a court by court basis. This should be an easily comprehensible system capable of benchmarking between areas and susceptible to trend analysis. (33.19 – 33.23)

139. We recommend that the working up of detailed system targets should be the responsibility of the National Criminal Justice Board. (33.24 – 33.27)

140. We recommend that there should be regular thematic cross-agency inspections of critical elements of the criminal justice system. (33.28 – 33.30)
Chapter 4

SUMMARY CRIMINAL PROCEDURE IN SCOTLAND TODAY

Introduction

4.1 There are two distinct forms of criminal procedure in Scotland – solemn procedure and summary procedure. An overview of action within the entire criminal justice system in 2001 can be found at annex D. The review was concerned with aspects of summary procedure. In solemn procedure, the trial is before a judge of the High Court or a sheriff, sitting with a jury of 15. The judge or sheriff decides questions of law and the jury decide questions of fact. The Crown decides whether to indict the case in the sheriff court, where the maximum sentence is 3 years, or in the High Court.

4.2 There are two separate courts having jurisdiction in summary cases in Scotland: the sheriff court and the district court. Summary criminal cases may be heard by a sheriff in the sheriff court or by a bench of one or more lay justices in the district court. In Glasgow district court cases are also heard by a stipendiary magistrate sitting alone, who has the sentencing powers of a sheriff sitting summarily. In summary procedure the judge, whether a sheriff, a stipendiary magistrate or a lay justice sits without a jury and decides questions of both law and fact. Summary criminal trials are the most common form of trial in Scotland. Summary criminal proceedings account for 96% of criminal cases prosecuted in court in Scotland.

4.3 The types of offence dealt with in the summary courts range from breach of the peace, shoplifting and fraud to serious assault and weapons offences, but they also include nearly all road traffic offences and a great many other offences. In 2000, almost 50% of persons called to the district court had a motor vehicle offence as their main offence. In the case of the sheriff courts, motor vehicle offences and crimes of dishonesty (such as housebreaking) account for over 50% of offences dealt with.

The Investigation and Reporting of Crime

4.4 The procurator fiscal is responsible for the investigation and prosecution of crime in Scotland. In cases of serious crime, the procurator fiscal will become involved at the earliest stage, often well before a report is submitted to him or her. In cases of less serious crime, the investigation is usually completed before the
report is submitted, although the procurator fiscal may direct that further inquiry be undertaken. Most of the cases received by the procurator fiscal are reported by the police. In addition, each year many thousands of people are reported for consideration of proceedings from over 50 specialist reporting agencies, including, for example, local authority enforcement sections, the Driver and Vehicle Licensing Agency and HM Customs and Excise.

4.5 In 1952, the Scottish Court of Criminal Appeal set out the relationship between the police and the procurator fiscal in the following terms,\(^5\) “When a crime is committed it is the responsibility of the procurator fiscal to investigate it. In actual practice much of the preliminary investigation is conducted by the police under the supervision of the procurator fiscal”, and went on to say that: “The duty of the police is simply one of investigation under the supervision of the procurator fiscal, and the results of the investigation are communicated to the procurator fiscal as the enquiries progress. It is for the Crown Office and Procurator Fiscal Service and not for the police to decide whether the results of the investigation justify prosecution.”

4.6 Under statute, it is provided that, where an offence has been committed, police constables are to “take all such lawful measures and make such reports to the appropriate prosecutor as may be necessary for the purpose of bringing the offender with all due speed to justice”\(^6\) and in directing his or her constables in the performance of their functions, “the Chief Constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor”.\(^7\) Specifically, the Lord Advocate may issue instructions to chief constables with regard to the reporting of offences, for consideration of the question of prosecution.\(^8\)

4.7 The procurator fiscal has no authority to direct specialist reporting agencies in the investigation or reporting of crimes and offences, but the Crown Office and Procurator Fiscal Service provides guidance designed to enable them to contribute effectively to achieving an outcome in reported cases which best serves the public interest.

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5 Smith v HMA 1952 JC 66.
6 Police (Scotland) Act 1967, section 17(1)(b).
7 Police (Scotland) Act 1967, section 17(3).
8 Criminal Procedure (Scotland) Act 1995, section 12.
The Courts

4.8 The sheriff court and the district court each have their own history which has led to separate staffing and administrative arrangements.

Sheriff Courts

4.9 There are six sheriffdoms in Scotland each of which has a sheriff principal with sheriffs sitting in each main town. The sheriffdoms have been created for jurisdictional purposes. The areas are: Grampian, Highland and Islands; Tayside, Central and Fife; Lothian and Borders; Glasgow and Strathkelvin; North Strathclyde; and South Strathclyde, Dumfries and Galloway. Apart from Glasgow and Strathkelvin these sheriffdoms are separated into districts for administrative convenience. The boundaries of these districts do not always coincide with those of local authorities. An offence committed in one district of a sheriffdom can be tried in a sheriff court of another district of the same sheriffdom.

4.10 The Scottish Court Service (SCS) administers the Supreme Court and sheriff courts throughout Scotland. It has responsibility for the administration of the Court of Session, High Court of Justiciary, the Office of the Accountant of Court and 49 sheriff courts throughout the country. Those administrative responsibilities include financial management, resource management in terms of court staff and maintenance and development of the court estate. Employees of the SCS act as clerks of court in the High Court/Court of Session and the sheriff court. They are not required to be legally qualified. The SCS has no specific involvement with the district courts although district courts sometimes use sheriff court buildings.

District Courts

4.11 The present system of district courts was established by the District Courts (Scotland) Act 1975. This Act reorganised the previous system of justice of the peace courts and Burgh courts in the light of the local government reorganisation following the Local Government (Scotland) Act 1973.

4.12 Under the 1975 Act, the district courts were aligned with each of the reorganised local authorities. There are currently district courts in 30 of the 32 local authority areas in Scotland, the exceptions being Shetland and Orkney where all summary business is dealt with in the sheriff court. In many local authority areas there is more than one district court, giving a total of 64 throughout Scotland. Each district court has jurisdiction within a Commission Area, which
coincides with the associated local authority boundary. The district court bench in Scotland is almost exclusively staffed by lay justices of the peace (the exception being the stipendiary magistrates in Glasgow). The district court convenes with one, two or three justices presiding (the norm being one).

4.13 It is the statutory duty of local authorities to manage the district courts and there is no statutory or administrative provision for any central control or organisation of these courts. Each local authority decides for itself what building and other facilities to provide and how to prioritise the provision and up-keep of such facilities alongside its other estate management responsibilities. Funding from central to local government includes an element for the provision of a district court within unhypothecated revenue support grant, but it is ultimately for local authorities to decide where to target their resources.

4.14 The clerks of the lay district courts are advocates or solicitors appointed by the relevant local authority. It is the clerk’s duty to advise justices on matters of law, practice and procedure. However, the clerk takes no part in decisions on conviction or sentence.

Judges in the Summary Courts

The Sheriff

4.15 The title of sheriff is an ancient one and can be traced back to late in the first millennium. In Scotland the office of sheriff can certainly be traced to the 12th century. Their original function was as local administrator, military officer, tax collector and judge.

4.16 Sheriffs are appointed from the ranks of solicitors and advocates of at least 10 years’ seniority. In practice, newly appointed sheriffs are considerably more experienced than this. The great majority of sheriffs are sheriffs with jurisdiction in one sheriffdom. They are sometimes referred to as “resident sheriffs”. So called “floating sheriffs” hold commissions which enable them to sit in any sheriffdom as required. Resident and floating sheriffs have full-time, permanent appointments. There are also part-time sheriffs who are advocates or solicitors who are in practice or who have practised as such. They may be called upon to assist as required in any sheriff court in Scotland. Honorary sheriffs are appointed by the sheriff principal and need not be legally qualified. They may only sit in the court in which they are appointed. They usually sit only when the resident sheriff is not available.
They deal mainly with first appearances from custody and may be called upon to sign documents which require a sheriff’s signature as a matter of urgency.

4.17 Although a full-time sheriff is normally appointed to the court of a specific district, he or she has jurisdiction throughout the sheriffdom in which that district lies, and the sheriff principal can direct any of the sheriffs of his or her sheriffdom to sit in any district.

4.18 The criminal jurisdiction of a sheriff is both summary (the sheriff sits alone) and solemn (the sheriff sits with a jury). In relation to summary cases the maximum sentence of imprisonment (or detention) and the maximum level of fine which can be imposed by a sheriff are detailed in the table at paragraph 4.29 below. Sheriffs can impose a range of other sentences which include probation orders, community service orders, compensation orders, drug testing and treatment orders, restriction of liberty orders, supervised release orders and extended sentences. Jury trials in the High Court and the sheriff court follow essentially the same procedure. In a solemn procedure case the maximum sentence of imprisonment or detention which the sheriff can impose is 3 years, though the sheriff may remit the offender to the High Court for sentence if the case merits a longer sentence.

The justice of the peace

4.19 The commission of the peace was originally instituted in Scotland in the 16th century. Initially, justices were given the task of administering the county within which they resided until this work passed to the County Councils with their establishment in 1888. Justices of the peace were then left with jurisdiction in the licensing board and minor criminal cases.

4.20 Appointment of justices of the peace is by recommendation from local Advisory Committees to Ministers of persons considered to be suitable in terms of character, integrity and understanding. There are just under 4,000 JPs in Scotland. Most of them are designated as “signing justices” and have signing duties only (such as signing a document for the purpose of authenticating another person’s signature). Over 700 full justices are able to sit in judgement in the district court across Scotland. Before sitting on the bench, full justices are trained in basic law, procedure and sentencing issues with a view to ensuring that they

9 See paragraph 7.31 for more information on the history of justices of the peace.
exercise their discretion properly in the light of such legal advice as they may receive from their clerks.

4.21 The justice of the peace, along with jury service, is the current embodiment of lay participation in the Scottish criminal justice system. Neither the procedure relating to jury cases nor the arrangements for the lower courts have remained constant over the centuries, but reliance on the knowledge and understanding of local people has been a recurring theme. It is argued that local knowledge enables a justice to respond to local community concerns.

4.22 The fundamental requirement for being appointed a justice of the peace is that a candidate must live within 15 miles of the Commission Area to which he or she is to be appointed – only in exceptional circumstances of public interest will the Scottish Ministers waive that requirement. Similarly, justices’ powers extend only as far as the jurisdiction of the Commission Area to which they are appointed.

4.23 The maximum sentence of imprisonment (or detention) and the maximum level of fine which can be imposed by a lay justice sitting in the district court are detailed in the table at paragraph 4.29 below. Lay justices can also impose a range of other sentences including probation orders, compensation orders and totting up disqualifications, but not obligatory or discretionary disqualifications for motor vehicle offences.

The stipendiary magistrate

4.24 In addition to lay justices the district courts may also be presided over by stipendiary magistrates. Unlike justices of the peace who are unpaid laity, stipendiary magistrates are paid professionals. The option of appointing a stipendiary to a busy lay court has existed since the end of the 19th century and their powers were extended soon after their introduction to match those exercised by a sheriff dealing with summary criminal business. The District Courts (Scotland) Act 1975 continues to make such arrangements available.

4.25 It is necessary to have been qualified for 5 years as an advocate or a solicitor before being considered for appointment as a stipendiary magistrate. The approval of the Scottish Ministers is required for a full-time appointment. Similarly, Ministers have statutory authority to direct local authorities to appoint a qualified person as a stipendiary magistrate if it is considered expedient to do so in order to avoid delays in the administration of justice.
4.26 There are only four stipendiary magistrates in Scotland at present, all of whom are based in Glasgow. Like justices of the peace, stipendiary magistrates’ jurisdiction extends only as far as that of the local authority and Commission Area to which they were appointed.

The level of business in the summary criminal courts

4.27 There have been very notable changes in the number of cases calling in district courts over the last decade. In 1992 85,000 accused were proceeded against in the district court. By 2002 that figure had fallen to an estimated 37,000, largely as a result of the expansion of alternatives to prosecution (for example, the growth of fiscal fines) and the marking of cases by the procurator fiscal. Further discussion of the decline in district court business can be found from paragraphs 7.18-7.19 (and note para 11.12 on the effect of fiscal fines also). The business in the district courts has therefore approximately halved over a period of about 10 years. The number of sittings in the district courts varies considerably across the country. Between 1992 and 2000 the number of persons called to sheriff summary courts fell by over 15%, before increasing by 11% to an estimated 90,400 in 2002.

4.28 A breakdown of the caseload dealt with by persons proceeded against in each of the courts in recent years is provided in the table below. (Source: SEJD court proceedings database).

<table>
<thead>
<tr>
<th>Year</th>
<th>All (**) Courts</th>
<th>Solemn Courts</th>
<th>Total</th>
<th>Summary Courts</th>
<th>Stipendiary Magistrate</th>
<th>District</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>198,038</td>
<td>5,183</td>
<td>192,781</td>
<td>96,344</td>
<td>11,732</td>
<td>84,705</td>
</tr>
<tr>
<td>1993</td>
<td>183,674</td>
<td>5,250</td>
<td>178,134</td>
<td>92,742</td>
<td>10,472</td>
<td>74,920</td>
</tr>
<tr>
<td>1994</td>
<td>178,067</td>
<td>5,341</td>
<td>172,542</td>
<td>93,466</td>
<td>10,893</td>
<td>68,183</td>
</tr>
<tr>
<td>1995</td>
<td>176,423</td>
<td>4,936</td>
<td>171,446</td>
<td>94,758</td>
<td>10,649</td>
<td>66,039</td>
</tr>
<tr>
<td>1996</td>
<td>174,844</td>
<td>5,393</td>
<td>169,413</td>
<td>96,955</td>
<td>9,973</td>
<td>62,485</td>
</tr>
<tr>
<td>1997</td>
<td>171,932</td>
<td>5,126</td>
<td>166,688</td>
<td>95,097</td>
<td>9,943</td>
<td>61,648</td>
</tr>
<tr>
<td>1998</td>
<td>158,815</td>
<td>5,003</td>
<td>153,717</td>
<td>88,741</td>
<td>7,794</td>
<td>57,182</td>
</tr>
<tr>
<td>1999</td>
<td>146,474</td>
<td>5,407</td>
<td>140,925</td>
<td>85,216</td>
<td>6,689</td>
<td>49,020</td>
</tr>
<tr>
<td>2000</td>
<td>136,772</td>
<td>5,160</td>
<td>131,942</td>
<td>81,517</td>
<td>5,081</td>
<td>44,899</td>
</tr>
<tr>
<td>2001</td>
<td>139,345</td>
<td>5,151</td>
<td>134,157</td>
<td>87,438</td>
<td>5,644</td>
<td>41,075</td>
</tr>
<tr>
<td>2002*</td>
<td>138,900</td>
<td>5,300</td>
<td>133,600</td>
<td>90,400</td>
<td>6,200</td>
<td>37,000</td>
</tr>
</tbody>
</table>

* estimated data. ** Includes a small number of cases where court type not known.
J urisdiction of the summary courts

4.29 The jurisdiction of these courts so far as imprisonment (or detention) and fines are concerned may be summarised as follows:

<table>
<thead>
<tr>
<th></th>
<th>Sheriff court summary</th>
<th>Stipendiary magistrate</th>
<th>District court</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 months’ imprisonment (but 6 months’ where the accused has a previous conviction for personal violence or dishonesty, or other periods where specified by statute)</td>
<td>Maximum fine, currently £5,000 (level 5 – unless there is a lower or higher maximum penalty for a particular offence dictated in statute)</td>
<td>as for sheriff court summary</td>
<td>60 days’ imprisonment</td>
</tr>
<tr>
<td></td>
<td>as for sheriff court summary</td>
<td>as for sheriff court summary</td>
<td>Maximum fine, currently £2,500 (level 4 – unless there is a lower or higher maximum penalty for a particular offence dictated in statute)</td>
</tr>
</tbody>
</table>

J urisdiction of the sheriff courts

4.30 The jurisdiction of the sheriff court is wide and includes both civil and criminal business. Sheriff courts have jurisdiction in both summary and solemn (more serious) criminal cases and hear cases involving all but the most serious of crimes, such as rape and murder. In cases of solemn procedure, a sheriff may sentence offenders to up to 3 years’ imprisonment (or detention of those under 21). In summary cases the maximum is noted in the table at paragraph 4.29 above. There are a very small number of statutory provisions which provide for higher maximum sentences, for example, the Police (Scotland) Act – 9 months and the Misuse of Drugs Act – 12 months. The maximum fine which may be imposed is £5,000, unless there is a lower or higher statutory maximum sum.

J urisdiction of the district courts

4.31 In geographical terms, the jurisdiction of a district court extends to offences alleged to have been committed within its Commission Area. However, if there are allegations of offences in more than one Commission Area all offences may be tried in an area in which one of them was allegedly committed.

4.32 The district court has jurisdiction to try any statutory offence which is triable summarily, unless otherwise specified by statute. Lay district courts do not have jurisdiction to deal with a number of offences including theft by housebreaking,
serious assault, forged bank notes or theft or reset where the value of property is substantial.\textsuperscript{10} They cannot deal with cases of dangerous driving because, on conviction, disqualification from driving is obligatory unless there are special circumstances. The lay district court does not have power to disqualify from driving other than under the totting up provisions. The maximum term of imprisonment and level of fine which can be imposed by the district court are set out in the table at paragraph 4.29 above.

4.33 The jurisdiction and powers of the district court may also be exercised by a stipendiary magistrate who has the same powers as a sheriff when dealing with summary business. That means that the maximum powers of sentence in the district court are increased for stipendiary magistrates. Stipendiary magistrates may deal with any of the crimes which may be dealt with by a sheriff sitting summarily, but only if they have been committed within the district court’s territorial jurisdiction.

Disqualification from driving

4.34 The Road Traffic Offenders Act 1988 specifies that the district courts may try any fixed penalty offence or any other offence in respect of which a conditional offer may be sent in terms of the offences covered by the Act. As has been noted the lay district court cannot try any offence involving obligatory disqualification, such as dangerous driving or drunk driving; nor can they impose a discretionary disqualification (e.g. for careless driving or using a vehicle without insurance). They are able to disqualify for repeat offences (totting up). The consequence of these restrictions on the sentencing powers of the lay district court is that most road traffic cases are prosecuted in the sheriff court.
A Unified Summary Court System

Chapter 5

A UNIFIED SUMMARY COURT SYSTEM

Introduction

5.1 One of the first issues the Committee addressed was that of the future structure of the summary court system. Its first order consultation addressed the issue of whether there should be a single summary court system. If unification went ahead, it also sought views on whether a unitary or two-level summary court would be required and which judges—lay and professional or professional only—should deliver summary justice.

5.2 There are two separate issues to be resolved here, although responses to consultation reflected a degree of confusion between them.¹¹ The report deals with them in separate chapters. The first issue dealt with in this chapter is that of how summary justice in Scotland should be organised and administered. Should we continue with the current pattern of central administration of sheriff courts by the Scottish Court Service on a consistent basis, but the administration of district courts on a highly localised basis by 30 local authorities? Or should we now move to a single, unified court administration? On that latter model there would no longer be local authority involvement in running local courts. Instead a single body—in effect an expanded Scottish Court Service—would administer all courts.

5.3 There is a separate and (for the Committee) more contentious issue about the level and nature of judges who should, in the future, deliver summary justice. Should the future pattern continue with a mix of lay and professional justices, or should Scotland move to a fully professional judiciary in the summary courts? There is no necessary link between moving to a unified court administration and moving to a wholly professional judiciary: in England and Wales they are currently unifying court administration while retaining lay magistrates with an expanded jurisdiction. There was a range of views within the Committee on this issue, reflected in a majority report in chapter 7, and a note of dissent from two members (annex A).

¹¹ A majority of responses to the consultation exercise were opposed to a single level of court, but it appears from the terms of their responses that their concern focused not on the issue of who administered the courts but on the issue of whether justices should continue to exercise a separate, lower tier jurisdiction in the summary court. The responses to consultation are therefore considered in more detail in chapter 7, which deals with that latter issue.
The Committee’s approach

5.4 In examining the issue of court administration, the Committee focused on achieving the right fit between its recommended strategy for the summary criminal justice system and the structures and systems needed to support the delivery of that strategy. We paid particular regard to the key principles set out in chapter 2, particularly those of effectiveness, simplicity and consistency. Within that framework the way ahead should, we felt, be decided on principles of best value – realising the optimum balance between economy, efficiency, effectiveness and quality.

5.5 These considerations were applied to the infrastructure needed to deliver an effective administration – good quality service to court users, full support to the bench, planning and delivery of investment in the estate and technology and a simple structure which facilitates greater integration of the criminal justice system and scrutiny of its performance.

5.6 We concluded that unified administration would offer:

- planning for and investment in infrastructure, IT and training on a consistent basis across Scotland;
- benefits to court users through administration by an organisation specialising in this distinctive area of service provision;
- greater flexibility both in terms of case management and in terms of making optimal use of resources;
- a system capable of greater consistency, transparency and accountability;
- a system which is more responsive when change is required; and
- a more pro-active system of case management.

Support to the Bench

5.7 The administration of justice in the sheriff courts is regulated by the sheriffs principal in the exercise of their authority as set out in the Sheriff Courts (Scotland) Act 1971. Sheriffs principal have a statutory responsibility to secure the speedy and efficient disposal of business in the courts within their Sheriffdom. They are responsible for such matters as:

- the programming of court business;
- the allocation of business to individual sheriffs;
• the general conduct of court business; and
• judicial leaves of absence.

5.8 The recruitment of sheriffs is regulated by the Judicial Appointments Board and their training by the Judicial Studies Committee.

5.9 Leaving aside the question of a lay or professional bench, the Committee considered the differences between this arrangement and the position as it exists for justices and assessors in the district courts.

5.10 Scotland’s Commission Areas – the local authority areas in which district courts are run and managed – are inevitably widely different in scale and resources. For example, the three courts in Argyll and Bute each meet monthly. The monthly caseload in Lochgilphead, the least busy court, is only 20-40 cases. Contrast that with Edinburgh, running eight courts per week to deal with an average weekly caseload of 225 cases or Glasgow, running a full 5 days a week to hear almost 400 cases.12

5.11 The variations between Scotland’s district courts are not simply the result of its widely varying density of population. Local authorities are obliged by statute to provide a legally qualified court clerk and “suitable and sufficient premises and facilities for the district court”. They have considerable local latitude in interpreting these broad requirements, however, and there is no requirement for minimum training for justices, nor any centrally prescribed training or competences. It appears that central prescription of training was originally envisaged when the District Courts Act was framed – Section 14 provides that:

“[Scottish Ministers] may make schemes and provide courses for the instruction of justices of the peace, and it shall be the duty of the Justices’ Committee of a Commission area to implement and administer any such schemes in accordance with arrangements approved by [Scottish Ministers].”

As a matter of fact, however, no such schemes have been provided. The District Courts Association has taken steps to introduce a National Competence-Based
Framework, and arranges regular training courses of good quality, but has no power to require that all justices attend.

5.12 The result appears to be a wide geographic variation in the number of days training provided/funded per year: the survey already quoted suggests a range of between one and 12 days per year training for justices. The amount of time that legal assessors spend on summary work as opposed to any other council legal activities is not consistent and consequently their quality and experience is variable. Again, information provided suggests that the amount of training which they receive differs widely between Commission areas. In discussion with a number of local authority legal staff the point was made to the Committee that there is no natural progression for clerks involved in district court work. This can lead to a lack of motivation to deliver high standards or improve on existing standards.

Investment in the Estate

5.13 A stated objective of the SCS is to provide courthouses of appropriate size and quality. This means that SCS takes all reasonable steps to ensure that all sheriff courts comply with statutory requirements – Health and Safety, Disability/Access as well as the ECHR. The terms of the Scottish Strategy for Victims are applied consistently across sheriff courts – where possible providing for segregated witness accommodation and particular provision for vulnerable witnesses.

5.14 Within the district court estate there are clear variations in terms of investment in premises. In some areas new premises to a high standard have been provided or older premises refurbished, but the standard in other areas is not so high and in a few places poor. The Committee found it impossible to get an accurate estimate of recent capital expenditure on district courts, because in many cases courts are housed within larger complexes (for example, within the council chambers) so that capital expenditure incurred may not have been recorded specifically against the court. It is, however, clearly impossible to devise an overall strategy for the district court estate within the current management arrangements nor is there ready scope for cross boundary rationalisation even where that might be appropriate.
Investment in Technology

5.15 The Committee also considered the issue of IT investment and planning. The continuing development of linkages between IT networks in the criminal justice system will play a crucial part in improving the effectiveness of summary justice in the future. This work is being taken forward under the ISCJ IS\textsuperscript{13} project. ISCJ IS is not a separate computer system; it is a programme of IT protocols which automate information sharing and exchange between the various agencies. Apart from facilitating case management, ISCJ IS improves the efficiency and quality of information input to the Scottish Criminal Records Office, which is the main repository of information in the summary justice system and the source of most information published by the Justice Department on system performance.

5.16 We noted that all but two local authorities now have or are developing electronic court management and fines enforcement systems for their district courts. Some courts (including those in the four large cities) are now “live” on ISCJ IS and transmitting information to SCRO; others are working towards full ISCJ IS integration.

5.17 The Committee applauded the commitment of local authorities to the improvement of data flow in relation to district court business. It felt, however, that similar issues arose in relation to IT as in relation to estates. The current fragmentation is not conducive to the development of a national IT development strategy for the courts, nor does it make for straightforward amendment and development of the IT system in response to new demands and new data flows. Recommendations later in this report will, if implemented, necessitate the retention of additional information by SCRO – on, for example, recorded police warnings. It will be critical to success that the necessary data pathways can be specified simply and quickly and implemented in a standard fashion.

5.18 The Committee considered that greater consistency in investment in staff, IT and training – based on proper national needs assessments – was essential to support high quality, consistent justice.

5.19 It felt, however, that it would be unrealistic to secure that improvement by imposing new monitoring schemes, standards and targets on local authorities in relation to a function which it might well be argued is not a core business of local

\textsuperscript{13} Integration of Scottish Criminal Justice Information Systems.
government. This is perhaps particularly true in a small jurisdiction like Scotland. For many local services variation between localities may be an appropriate response to varying needs. But the delivery of justice is not a purely local service. Justice should be delivered in a consistent way and within an equitable framework of support regardless of the identity of the accused or where he or she lives.

5.20 The Committee concluded, therefore, that economies of management effort could be secured, and consistency of infrastructure improved, by centralising court administration within an expanded SCS.

A Better Deal for Court Users from Support by an Agency Specialising in Courts Management

5.21 The quality of provision in the sheriff courts is established by SCS standards as set out in the Statement of Charter Standards. This provides for standards of accommodation and front line service to be applied to all court users. There is also a particular provision for witnesses as set out in the joint COPFS/SCS statement on Crown Witnesses.

5.22 Levels of service provision in the sheriff courts fully support the Scottish Strategy for Victims. In particular, a Victim Support Scotland Witness Service is established in all sheriff courts. The support includes particular arrangements such as pre-trial visits for those attending court. Replicating this in the district courts would, under current arrangements, require VSS to co-ordinate its Witness Service provision with 32 local authorities.

5.23 A court user satisfaction survey was piloted early in 2003 by the Scottish Court Service. The survey included all non-professional court users in a sample of courts and formed a good basis for an improvement plan and a valuable insight into the expectation of users. This kind of activity is clearly much easier to organise within a unified system and change much easier to implement.

5.24 Other illustrations of the advantages of unification considered by the Committee included the need for a clear strategy to meet the physical requirements of the Disability Discrimination Act 1995, and the equal need to deliver good quality interpretation facilities to meet the ECHR requirements of a fair trial. Local authorities are of course addressing DDA requirements but for them courts are – inevitably and correctly – a small part of what they do. SCS has undertaken a full independent review of its built estate, and has begun a phased
programme of work designed to address the physical requirements of part III of the Disability Discrimination Act. In relation to court interpretation local authority practice is variable; again, it is easier for SCS to address centrally the issue of monitoring and driving up standards of court interpretation.

5.25 These illustrations highlight the range of issues which need to be addressed on a consistent basis across Scotland. The Committee considered that greater economy of effort and consistency could be achieved by unified management of the court estate and court services by a central agency. It also took the view that single management would make it easier to address the changes required, and to monitor progress.

**Greater Flexibility**

5.26 A unified system would have practical advantages. Many persistent offenders have several pending cases at any given time, sometimes 10 or more. Commonly these cases will be in more than one court. If the management of the summary justice system was unified it would be easier to transfer most cases to one court, where the offender’s behaviour could be addressed in the round. (See chapter 16 below for further discussion of dealing with multiple cases against an accused.) Delays and adjournments to await the outcome of other cases would be reduced.

5.27 A unified system will promote economies of scale and greater flexibility of case allocation between different court premises. This has obvious advantages for both police and procurators fiscal, with fewer courts to service and more scope for effective deployment of limited manpower. A single unified court eliminates the need for the procurator fiscal to make marking decisions for different levels of summary court and allows more flexible management of court workloads and individual cases. One local point providing summary justice is also easier for the public to identify and respect/understand; interestingly, current awareness of the district court and its role was shown by the public attitudes survey to be low.

5.28 Research commissioned by the Committee on the costs of the summary justice system (see also paragraph 7.68) suggested that there is an optimum size for a summary court in terms of cost per case. The unification of the summary courts would offer an opportunity to use the current district court estate in combination with the sheriff court estate to create units closer to the optimum sizes identified in the research. We do not however suggest that achieving
optimum size of court unit should be the sole criterion and we recognise the importance of maintaining local access to justice.

**Greater Transparency, Accountability and Responsiveness to Change**

5.29 There is increasing awareness in Scotland that it is no longer enough to focus on the performance of the individual service delivery organisations in the criminal justice field. The focus is much more on the effectiveness of the system as a whole in delivering end-to-end justice – from the point at which a crime or offence is detected to the point at which the case has been disposed of and/or the offender has paid his or her debt to society.

5.30 In 2002 the Lord Advocate and Deputy First Minister commissioned the Crown Agent, Andrew Normand, to carry out a review with the following remit:

> “Having appropriate regard to the interests of justice, to make proposals for the integration of the aims, objectives and targets of the principal agencies which make up the criminal justice system in Scotland, in order to ensure the more efficient, effective and joined up operation of the system and to secure delivery of the criminal justice priorities of the Scottish Executive.”

5.31 Background work undertaken for Andrew Normand’s Review revealed widespread concern among staff in the core delivery agencies – the police, the Crown Office and Procurator Fiscal Service, and the Scottish Court Service – about the failure of the system as a whole to operate as such. The report noted:

> “This research established a very clear recognition of the need for closer and more effective working relationships between the different criminal agencies and it disclosed an apparently genuine commitment to the idea that things should be different and better.”

It disclosed serious problems of inter-agency communication, knowledge and understanding and “organisational empathy”.

5.32 In response, the Review recommended that:

> “There should be a top level national board of senior officials and officers to oversee the operation and performance of the Criminal Justice system against the overarching aim, objectives and targets, to keep those under
A Unified Summary Court System

review, to ensure co-ordinated and consistent planning across the system and to be responsible for a national CJ S plan.”

5.33 The Review also recommended an effective framework of co-ordination and liaison at local level in the form of local criminal justice boards.

5.34 In response, the first meeting of the National Criminal Justice Board was held on 1 December 2003, and pilots of local boards to be chaired by the sheriff principal are underway in the sheriffdoms of Lothian and Borders and of Tayside, Central and Fife.

5.35 The Committee agrees strongly that a system-based approach is required. Such an approach is, however, likely to be more effective if the system is as simple as possible. Unified administration of the summary courts would give a single clear line of judicial and management responsibility for the delivery of justice in 96% of the cases which come before the courts in Scotland. An arrangement whereby a sheriff principal had responsibility for the management of all the summary courts in a given area would ensure that there are much more direct lines of management and accountability, consistency and provision across a wider area (six sheriffdoms compared with six sheriffdoms and 30 or 32 local authorities) and a more manageable and focused system. It is not suggested that local criminal justice boards will have a direct line management role.

5.36 The Committee has noted the strong interest shown recently by Parliamentary Committees in the wider issue of whole system efficiency and effectiveness. It has concluded that accountability would be enhanced, and scrutiny by Audit Scotland and Parliament facilitated, if single management of the summary courts was put in place.

5.37 For all these reasons the Committee considered that a unified summary court system would be preferable in principle to the current mixed management by the Scottish Court Service and 30 local authorities.

Potential Cost

5.38 The Committee also considered that unification of the court system offered scope for long-term cost efficiencies. In relation to the court estate, as already noted, the current fragmented management offers no scope for cross boundary rationalisation to reflect shifts in population or changes in the volume of business. Preliminary assessment by SCS indicates that a unified summary system with the
current caseload could operate with around 60% of the court buildings currently used for summary business, including all the current sheriff courts. This assessment is designed to leave sufficient leeway within the sheriff court estate to cope with other pressures (such as the steady increase in solemn business). It would not involve a major increase in travelling time for individuals required to appear in court or to give evidence, since the planning assumption used is that the vast majority of the Scottish population should be within a maximum 45-60 minutes travelling time of the nearest court. In almost all cases locations will be accessible by public transport within that time. An increase in the proportion of cases diverted from prosecution may offer scope for further rationalisation, though the Committee recognised that that scope would be limited by the need to ensure ready access to local justice.

5.39 Rationalisation also offers scope to use the courts retained more efficiently. At present some courts within the summary system are overloaded, while others are operating well below optimal loading. The research carried out on behalf of the Committee by Professor Frank Stephen on the relative running costs of different types of court found that many sheriff courts were able to operate at a lower cost per case than district court commission areas, even when SCS’s central costs and those of sheriffs’ salaries were factored in. This counter-intuitive finding is probably linked to the steep fall in the number of cases handled by the district courts over the last ten years, and hence to increasing running costs per case. Unification offers an opportunity to adjust court loadings to achieve greater efficiencies and hence lower costs per case. It does however need to be recognised that if consistency is to be realised across a combined estate there may be a need for additional initial investment in some places and ongoing overall investment in parts of the present district court estate if consistent standards are to be maintained.

5.40 In terms of staffing, initial SCS estimates suggest that they would require a relatively small number of additional staff – around 70-80 – to run a unified system. This compares favourably to our best estimate of the FTE number of staff currently engaged in running the district court system. Local authorities’ own returns suggest a figure of around 180 FTE non-legally qualified staff, with around 55 FTE legally qualified staff who act as clerks of court.

14 This research is available on the Scottish Executive website: www.scotland.gov.uk.
5.41 And, as noted above, a smaller estate means fewer journeys for the police and for those escorting prisoners to court, and fewer places of work for the Procurator Fiscal Service, offering scope for greater efficiencies through more effective staff deployment.

5.42 The Committee noted, however, that those SCS estimates were predicated not only on the creation of a unified court system but also on a unitary summary court run by professional judges with a common summary jurisdiction. The arguments for that latter approach are covered in chapter 7. A decision to retain lay justice and to create a two-level summary court would necessitate recalculation, likely to show a decrease in flexibility of judge deployment and case allocation and hence an increase in costs per case.

5.43 The Committee recognised that costs to SCS were only part of the unification equation. The consequences for local authorities of transition to a unified system from one in which they have individual responsibility for the provision of district court premises and facilities would need to be worked through in detail with COSLA.

5.44 Following a discussion between representatives of the Committee and of COSLA, COSLA undertook a quick consultation with members on the principle of a unified summary court. The results of this consultation showed that the majority of councils do not currently support unification, fearing that summary justice may be less accessible and accountable in a centralised regime. We recognise those fears and have tried to demonstrate above that a unified system could offer greater accountability with no significant loss in access (on that latter point, see paragraph 5.38).

5.45 We also recognise that a good deal of further work would need to be done in partnership with COSLA on our proposals for a unified system. That further work goes beyond the Committee’s remit, but issues for consideration would include:

- the arrangements by which SCS would acquire or lease court buildings currently in local authority ownership;
- the financial implications for local authorities of courts no longer required;
- the arrangements to protect the interests of staff whose transfer to SCS is required; and
• the scope for local authorities to absorb staff whose transfer to SCS is not required.

5.46 The Committee feels strongly that unified administration of the summary court system offers scope for a more efficient, transparent and accountable court system, better able to respond quickly when change is required. Preliminary assessment of the size of the estate and of staffing required suggest scope for long term efficiencies, notwithstanding the need for investment in improved physical standards (for example, Disability Discrimination Act compliance) and for enhanced staff training.

5.47 We recognise, however, that the process of unification will be one which needs to be worked through in detail with local authorities through COSLA and that these discussions should commence as soon as possible.

We recommend the unification of the administration of the summary courts under the Scottish Court Service.

We recommend that discussions between the Scottish Executive and COSLA on the implementation of this proposal should begin as soon as possible.
Chapter 6

ALIGNMENT OF BOUNDARIES

6.1 Sheriff court district and sheriffdom boundaries (and the police and Crown Office and Procurator Fiscal Service operating areas or divisions) have traditionally been set to achieve compatibility with local authority boundaries where possible. As a matter of policy and practice, both COPFS and ACPOS have adjusted their operational structures to be so aligned.

6.2 The last major re-organisation of the sheriff court district and sheriffdom boundaries was in 1975, following the Local Government (Scotland) Act 1973. A primary effect of the re-organisation was, in most cases, to make local authority areas and sheriff court districts co-terminous. The sheriffdoms comprised areas described by reference to the appropriate local government areas. Subsequently, as a matter of policy, sheriff court district boundaries followed local authority boundaries.

6.3 The sheriff court district and sheriffdom boundaries were again reviewed in 1996, as a consequence of local government re-organisation. In considering whether or not re-alignment of sheriff court boundaries was appropriate, the following criteria were considered to be particularly relevant:

- any change to sheriffdom/sheriff court district boundaries should not increase and, where practicable, should reduce inconvenience to court users;
- any boundary changes should, if possible, not increase waiting periods or place courts in a position where they would subsequently fail to meet their targets; and
- sheriffdoms and sheriff court district boundaries should, where practicable, cross as few local authority boundaries as possible.

6.4 These objectives were able to be achieved simultaneously in respect of the great majority of sheriffdoms/sheriff court districts. However, following the 1996 review, there remains an incongruity between certain sheriff court districts and local authority boundaries (mainly around Glasgow). This was mainly because alignment of the boundaries at that stage would have placed too much strain on neighbouring sheriff courts (Hamilton Sheriff Court in particular) following from what would have been a consequent transfer of business from Glasgow Sheriff Court. There is a particular incongruity in the Braehead area (between Glasgow...
6.5 There are clear system management attractions in aligning the local authority and sheriff court district boundaries and in the alignment of COPFS and police areas accordingly. A combining of the sheriff court and district court estates presents an opportunity to realise the benefits of alignment of boundaries while avoiding placing undue pressure on particular courts.

6.6 The drawing of sheriffdom boundaries has less of an immediate operational and court user impact than the sheriff court district boundaries but we would expect them to be re-defined in accordance with any adjustment to sheriff court district boundaries. There would be attractions in having co-terminous arrangements at a sheriffdom as well as at a district level where that is practicable. This would support the effective operations of the national and local criminal justice boards. This suggests that it would also be advantageous to review the sheriffdom boundaries at the same time as a review of sheriff court district boundaries.

6.7 Boundaries should remain aligned and should not be further realigned by one or more partners in the criminal justice system without full consultation with other criminal justice interests prior to any realignment taking place.

We recommend that the opportunity presented by restructuring the summary court system should be used to ensure that sheriff court districts are, so far as is practicable, co-terminous with police and procurator fiscal operating areas and with local authority boundaries.

We recommend that any consequent re-definition of sheriffdom boundaries should, so far as is practicable, be aligned with police and COPFS operating areas and with local authority boundaries.

We recommend that any future review of local government, police, COPFS or court boundaries should provide for full consultation with all justice system interests.
Chapter 7

JUDGES IN THE SUMMARY COURT

7.1 Given its strong and unanimous recommendation for a unified summary court system, the Committee went on to consider the type of judges who should sit. Should this be a mix of lay and professional judges, replicating the current pattern of professional sheriffs who deal with the more serious end of summary cases and lay justices who deal with the remainder? Or should Scotland now move to a wholly professional judiciary?

7.2 Many of the arguments advanced on either side of this debate have been well-rehearsed in other studies. For example, the Committee took account of a number of studies of lay justice in Scotland, in particular “Lay Justice” by Bankowski, Hutton and McManus,15 and “All manner of people” by Johan Findlay,16 as well as work on the magistracy in England and Wales, including in particular research by Russell and Morgan on their report “The judiciary in the (England and Wales) magistrates’ courts”.17 Members of the Committee also visited 11 summary courts across Scotland as well as a number of magistrates’ courts in England and a magistrates’ court in Northern Ireland.

7.3 The Committee quickly became aware of strong and conflicting beliefs on this issue. Some individuals and groups argue strongly in favour of a fully professional judiciary, including the majority of professionals who earn their living through work in the courts. Others, including most of those who are involved in or represent lay justice, take the opposite view. In consultation those in favour of professional justice tended to argue on the basis of greater consistency and continuity and the advantage of a robust professional presence on the bench. Those who support lay justices mentioned in particular the advantages of lay justices’ local community links and their resultant understanding of the communities they serve.

7.4 The Committee was anxious to inform itself fully of views on this issue not only among those involved in the justice system, but among the general public.

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7.5 Its first order consultation, carried out in 2002, attracted largely responses from those involved in the system. Although 62% of responses were in favour of retaining lay justice, this reflected practically unanimous support for the concept from justices and justices’ organisations. (Out of 125 responses to the first order consultation 38 were from JP Commission areas and 24 were from individual justices.) Many local authority responses appeared to have been prepared by the part of the Council responsible for district courts. Professional legal organisations were typically in favour of a fully professional judiciary.

7.6 Following on from that consultation the Committee ensured that it tested wider public opinion by covering this issue in some detail in its survey of Scottish public attitudes to aspects of the summary justice system. The results of that survey revealed that members of the public had the same range of views on lay versus professional justice as those more involved in the system. The researchers screened out anyone involved in the criminal justice system from the public survey: and the survey showed that relatively few of those questioned had had recent contact with the summary justice system (8% had been a victim of an offence in the past 2 years, 4% an accused and 6% a witness: these categories are not mutually exclusive). So it is not surprising that the researchers noted limited understanding of the differences between lay and professional justice, and considerable willingness to admit limited knowledge.

7.7 The key factual differences were explained to respondents (salaries, professional qualifications, etc.) and they were then asked to assign attributes they might expect to see displayed by professional or lay judges. Given the evidence above, we judge that responses reflected views on the principles involved, rather than an assessment of the system based on experience.

7.8 It is worth noting that this sample does appear to reflect the view that lay justice would be more likely to be aware of local sensitivities, but set against this perception is a view that professional judges are more likely to be consistent and less prone to prejudice. This may account for the outcome when the sample was asked whether they would prefer to be tried by a professional or lay judge.

Public Survey: Views on the attributes of lay and professional judges

<table>
<thead>
<tr>
<th>Attribute</th>
<th>Lay</th>
<th>Professional</th>
<th>Both Lay and Professional</th>
<th>Respondent Base</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
<td>%</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>In touch with people’s views</td>
<td>40</td>
<td>13</td>
<td>47</td>
<td>591</td>
</tr>
<tr>
<td>Treat people fairly</td>
<td>12</td>
<td>16</td>
<td>72</td>
<td>608</td>
</tr>
<tr>
<td>Consistent in the way they deal with cases</td>
<td>7</td>
<td>34</td>
<td>59</td>
<td>551</td>
</tr>
<tr>
<td>Aware of national concerns and priorities</td>
<td>10</td>
<td>39</td>
<td>51</td>
<td>589</td>
</tr>
<tr>
<td>Deal with cases quickly</td>
<td>32</td>
<td>21</td>
<td>47</td>
<td>517</td>
</tr>
<tr>
<td>Impartial, not prone to prejudice</td>
<td>8</td>
<td>28</td>
<td>64</td>
<td>596</td>
</tr>
<tr>
<td>Represent the views of society at large</td>
<td>27</td>
<td>22</td>
<td>51</td>
<td>569</td>
</tr>
<tr>
<td>Have a local knowledge</td>
<td>51</td>
<td>11</td>
<td>38</td>
<td>631</td>
</tr>
<tr>
<td>Understand the law</td>
<td>3</td>
<td>59</td>
<td>38</td>
<td>664</td>
</tr>
<tr>
<td>Are experienced in dealing with cases</td>
<td>3</td>
<td>56</td>
<td>41</td>
<td>650</td>
</tr>
</tbody>
</table>

Public Survey: What sort of judge would you prefer to face on the bench?

<table>
<thead>
<tr>
<th>Judge</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lay magistrate</td>
<td>15</td>
</tr>
<tr>
<td>Professional judge</td>
<td>50</td>
</tr>
<tr>
<td>Doesn't matter</td>
<td>25</td>
</tr>
<tr>
<td>Don't know</td>
<td>10</td>
</tr>
</tbody>
</table>

7.9 This strong preference to appear before a professional judge sits rather oddly with the views of the sample when asked whether there should be a continuing role for lay justice in the future. Sixty per cent of the sample favoured the continuation of lay justice, with 24% preferring a wholly professional summary system.

7.10 Reviewing the rather confusing picture of evidence on public and professional views, the Committee concluded that the issue of lay versus professional justice was not one which could be resolved in the abstract. Both forms of justice had long histories in Scotland: both had served well in many circumstances: neither was without flaw.

7.11 The Committee concluded, therefore, that a more fruitful approach would be to derive its recommendation from an analysis of the recent history and current context for summary justice in Scotland and further afield, and of the changes which it felt were required. The question to be answered was:
Given the current state of the Scottish justice system and the recommendations of this Report, which system – lay and professional or professional alone – will best deliver the changes which Scotland’s summary justice system now requires?”

On this basis the Committee examined the debates on lay justice since local government reorganisation 30 years ago necessitated major change.

7.12 We noted with interest the series of proposals put forward in 1973/4 when a revised system had to be developed in short order given the imminent abolition of burghs (and the Burgh courts, in which councillors sat in judgement on minor crimes) and counties (including their justice of the peace courts).

7.13 The 1973 White Paper ‘Justices of the Peace and Justices’ Courts’ proposed the creation of a justices’ court, on the following basis:

- court to be constituted by three justices of the peace, but with stipendiaries sitting alone playing a part in urban areas;
- justices to sit at least 24 times a year in order to build up expertise and improve consistency;
- the court to have wider powers than the current lay court, to relieve pressure on the sheriff court;
- the court to be centrally administered and financed; and
- staff to be provided by the extension of the legally unqualified sheriff clerk service; but
- clerks to receive special training in order to advise lay judges.

7.14 Reactions to that White Paper revealed a strong body of opinion that all judges should be professional; serious doubts as to whether sufficient lay judges could be found to sit in threes with the frequency sought; and universal opposition to the proposal for unqualified sheriff clerks to advise lay justices.

7.15 In response, the Government of the day put forward a revised proposal. It announced in Parliament that:

“To ensure that there will be an effective system to deal with summary courts business throughout Scotland when the present Burgh and JP courts

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disappear following local authority reorganisation in 1975, it has been decided that, instead of the system outlined in the White Paper, the sheriff courts will be expanded to absorb the additional work. A new type of professional judge will be appointed to sit in the sheriff court to assist with the increased business, and the Procurator Fiscal Service and the sheriff clerk service will be strengthened.”

7.16 There was then a change of government. The incoming government was committed to the retention of lay justice and explored a number of models, including a centralised three-tier sheriff court with sheriffs, stipendiaries and lay justices. Pragmatic considerations – notably the need to find professionally qualified court clerks to support lay justices without depleting the limited stock of independent practitioners – led the government to conclude that the new district courts should be placed within the responsibility of the local authority, with its flexible access to an in-house legal team.

7.17 Other considerations at the time were the need to minimise undue disruption given the already huge upheaval caused by local authority reorganisation, and the need for a seamless and rapid move to a new form of summary justice, given the large number of cases dealt with in the former Burgh and JP courts (80,000 per annum in the Burgh courts, 10,000 in the JP courts). The other consideration was the historic underfunding of the sheriff courts and their consequent inability to pick up the slack. It is, for example, intriguing to note that in 1973, despite the fact that Edinburgh was the only new sheriff court built in the 20th century to that date, jury trials had to be held in the Assembly Hall and had to stop during the General Assembly of the Church of Scotland and also when the premises were in use for the Festival and other events.

7.18 The decision taken in those circumstances, however, might not be the most appropriate decision to take now. Looking at key changes over the intervening years, perhaps the most important is the sharp recent decline in the number of cases dealt with in the district courts (as evidenced by the figures in the table at paragraph 4.27).

7.19 There are a number of reasons for this decline, including the fact that (as noted below) total recorded crime in 2002 was 25% less than the total recorded in 1991. The other key reason for decline is the introduction of a wider range of

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alternatives to prosecution for use by the police and the procurator fiscal. We discuss this in more detail elsewhere in this Report (chapters 9–11) and consider that the number of cases requiring full court procedure could be further reduced while still taking effective action against offenders. A further reason expressed to us on a number of occasions is a lack of confidence in the district court among procurators fiscal, resulting in many relatively minor cases being prosecuted in the sheriff court instead.

7.20 Other key changes over the last 30 years include substantial sustained investment in the sheriff court estate and in IT to support the handling of sheriff court cases. In relation to the district courts, however, where considerable discretion is left with the local authority as to how much to invest in buildings, training or IT, the pattern of investment across Scotland is patchy. Some local authorities have given a high priority to the needs of district court users and staff; others have given the district court lower priority in the context of overall pressures.

7.21 From a council point of view, a significant recent change is that the strong historical link between elected local office and sitting in judgement over minor local offenders in courts run by local authorities has been permanently broken by the impact of ECHR incorporation into Scottish legislation. Since the Bail, Judicial Appointments etc (Scotland) Act 2000, a member of the local authority may not be appointed to office as a full justice, though such a member may continue to be a signing justice. A full justice may sit on the bench: a signing justice may only perform limited functions authenticating documents and declarations.

7.22 The ECHR also places a new range of pressures on all courts to demonstrate that they are, and operate as, independent tribunals within the ECHR context. The recent case of Clark v Kelly re-examined the role of the legally qualified clerk to the district court, concluding that while he or she was not part of the court (which would have invalidated it as an independent tribunal) advice given by the clerk should be given in open court. We were told that this has raised the possibility of justices having to hear submissions from parties in the case as to the correctness of the legal advice offered by their assessor and then themselves having to rule on matters of law. We are not aware that this has yet
given rise to any real difficulties in practice. ECHR requirements are likely to generate further pressures on Scottish courts to re-examine how they work.

7.23 Looking at the overall profile of crime committed in Scotland, the Committee also noted that, despite an upward fluctuation from 2001, recorded crime in 2002 was still 25% lower than the peak figure recorded in 1991. Between 2001 and 2002, however, while recorded crime went up only by 1%, non sexual crimes of violence and crimes of indecency both rose 9%; within that last category, rapes and attempted rapes rose by 21%. There is room for debate as to what proportion of that increase is attributable to increased criminality, and what proportion to greater willingness to report crime to the police. There is, however, no debate about the impact of these changes on the solemn courts. In addition, the Committee noted the substantial and continuing increase in the most serious drugs cases. Research carried out for Lord Bonomy showed that two thirds of the 23% increase in High Court indictments between 1995 and 2001 was attributable to an increase in the number of serious drugs cases.

7.24 It is therefore not surprising that one of the recent trends in public policy has been the need to move criminal casework downwards throughout the system in order to relieve increasing pressure on the solemn courts. This was reflected in Lord Bonomy’s Report on the Reform of the High Court which recommended that the jurisdiction of sheriffs sitting in solemn procedure should be increased from 3 to 5 years’ imprisonment. In the White Paper “Modernising Justice: Reform of the High Court of Justiciary” the Executive indicated that it had accepted Lord Bonomy’s recommendation to this effect, and would implement the (existing) legislation in the context of wider legislative reform to the High Court.

7.25 The Committee took the view that in order to accommodate the potential increase in sheriff solemn business it will be necessary to increase the sentencing powers of sheriffs when sitting summarily (this is dealt with in more detail below from paragraph 7.83) in order that they can deal with the less serious cases presently heard under solemn procedure. Continuing with this process, there would need to be an increase in the jurisdiction of whoever heard cases below the level of the sheriff summary court (unless all summary cases were heard by sheriffs, which is unlikely to be an efficient use of resources – see paragraph 7.64 below).

7.26 The Committee took into account the overall trend towards the creation of more specialist courts dealing with particular groups of offenders, and also the growing interest in the concept of community courts as developed primarily in the USA. This latter is seen as a means of connecting communities to their local justice system and dealing with offences that impact particularly on the quality of life in the local neighbourhood.

7.27 However, the Committee also noted that at the heart of the approach of the New York Red Hook Community Court – and of such related Scottish developments as the drugs court – is the commitment of a very small core of professional judges devoted to this court alone and able to review personally the progress of those brought before them. The Red Hook Court has, we believe, a single judge. The success to date of the Glasgow Drug Court is closely tied not just to increased resources and better joint working but crucially to continuity on the shrieval bench, with two sheriffs only sitting.

7.28 This continuity would be extremely difficult to achieve with lay justices, who currently sit only around seven times per year on average and, consequently, are unlikely to build up the necessary experience and expertise, even if they were to sit more frequently than at present.

7.29 If, then, the trend is towards a more sophisticated and differentiated approach to individual offenders, it seems likely that professional judges will be better able to provide the continuing contact over time and the consistency required, either in the context of specialist courts (on which see our views in chapter 18) or through more consistent “rolling-up” of cases faced by an accused (on which see our recommendations in chapter 16).

7.30 Finally, the Committee considered briefly the position in other jurisdictions. In many parts of the Commonwealth there is now no lay justice involvement in summary criminal cases, though in some jurisdictions justices of the peace may sign warrants and play a part in the juvenile justice system. The trend has been to move to an all professional judiciary. This is particularly so of Canada and Australia, with the exception of Western Australia where justices of the peace sitting as a bench of two may deal with bail applications and hear minor criminal cases including road traffic matters. They may not impose custodial sentences. A number of Committee members visited Northern Ireland and observed that, with the exception of the juvenile court (where lay members formed part of the panel) it operated wholly with professional judges. The system of resident magistrates worked well and their independence was perceived as important.
7.31 A notable exception to the move away from the use of lay justice is England and Wales. Justices have an extremely long and well established history in England, the first statute instituting the office dating from 1361 and there being evidence of their existence even earlier than this date. In addition to their judicial duties they conducted a number of important administrative roles. The institution of justices in Scotland is somewhat more recent. The first Scottish statute creating justices in burghs was in 1587. In a statute of 1609 James VI extended them to counties, reflecting his experience of the English system. Attempts were made in the 16th and 17th centuries to amalgamate the Scottish and English legal systems but these were not successful. The responsibilities of justices of the peace have evolved both north and south of the border over the centuries into their current, mainly judicial, form.

7.32 The structure and workings of the criminal courts in England and Wales were considered in detail in the Auld Report, published in October 2001. That report recommended that the Crown Court and magistrates’ court be replaced by a unified criminal court consisting of three divisions. The lowest of those divisions (the magistrates division) maintains the role of lay magistrates south of the border in hearing the more minor summary criminal cases. The report also recommended that lay justices should be able to sit with professional district judges in the higher district division. Lord Justice Auld noted in his report that “No country in the world relies on lay magistrates as we do, sitting usually in panels of three, to administer the bulk of criminal justice”. This proposal was not accepted.

7.33 Having considered the position in England and Wales, we considered that the history and current role of the English magistracy is significantly different from that of the Scottish lay judiciary.

7.34 English magistrates deal with the full range of summary criminal cases; they have the same sentencing powers as the District Judges (the English equivalent of our stipendiary magistrates) and deal with around 91% of summary business. Their sentencing powers have for many years been significantly higher...
than those of Scottish JPs, and have recently been increased. For example, in 2003 they were able to sentence to 6 months’ imprisonment, or, in certain cases involving more than one offence, to 12 months. The Criminal Justice Act 2003 contains provisions to raise their custodial sentencing power to 12 months in respect of any one offence, although those provisions are yet to be commenced. They also have an extensive family and civil jurisdiction. They almost invariably sit in threes.

7.35 Scotland, by contrast, is a small jurisdiction in which a majority of summary cases are already handled by a professional judiciary. Scottish JPs now deal with around one third of summary business; as we have noted elsewhere, they rarely impose a custodial sentence (only 1% of persons with a charge proved before a JP in the district court received a custodial sentence in 2001).

7.36 We therefore concluded that the English experience does not necessarily point the way ahead in the very different Scottish context.

The Committee’s Recommendations and their Implications for Summary Business

Diversion from prosecution

7.37 Elsewhere (particularly chapter 11) in this Report the Committee has taken the view that without wishing to appear to trivialise or belittle categories of cases, especially their impact on victims, it is nonetheless the case that a court prosecution (even in a lay court) is an expensive and often inefficient way of dealing with offences that could more effectively be dealt with through alternatives to prosecution. Interestingly, 60% of those questioned in the public survey were in favour of alternatives to prosecution: most of them had heard of fiscal fines and fixed penalties.

7.38 If the recommendations in this Report are accepted the Committee believes there could be a significant reduction in the number of less serious cases prosecuted in the courts. In particular, the Committee believes that the recommendation that those choosing not to pay a fiscal fine offer should have to take the initiative in opting for court procedure or face the fiscal fine becoming a registered fine (para 11.21) will have a notable effect on the number of cases that currently appear before lay justices. Present figures indicate that around half of all fiscal fine offers are not accepted (see para 11.18 for the detailed figures). It is believed that many of those failed fiscal fine offers reach court out of inertia on
the part of the accused rather than a wish actively to contest the allegation. About 75% of those who are prosecuted having failed to accept a fiscal fine plead guilty. Visits to district courts and discussions with officials there suggested that a substantial proportion of cases appearing before the court are failed fiscal fine offers. Figures showing the exact proportion are not available, but Crown Office statistics drawn from 2002-03 data suggest that 70% of district court cases are new to the system (and therefore not offers of diversion which have been rejected). Much of the remaining 30% will, however, represent prosecutions where a fiscal fine offer has not been accepted.29

7.39 Calculations to show the net effect of the changes proposed in this Report on the summary case load are necessarily very approximate as they are subject to a number of variables, in particular, the overall crime levels and the attitudes of procurators fiscal on how to deal with a particular level of crime given an increased range of diversion possibilities.

7.40 Notwithstanding these caveats, the Committee estimates that the net effect of the proposed changes – and of changes recently introduced by the Home Office extending the range of road traffic offences eligible for fixed penalties – could be a reduction of 25% – 30% in the summary caseload (see para 7.46 below).

7.41 It may be helpful to summarise the basis of this calculation. In 2001 just over 130,000 people were proceeded against in the summary courts. The vast majority of these are single accused cases. The table at paragraph 11.36 suggests that a doubling of the fiscal fine to £200 could potentially impact on around 24,500 cases currently prosecuted each year in the summary courts because of the number of fines of between £100 and £200 currently imposed in those courts. As we note in that chapter, actual impact is likely to be lower, both because up to 30% of district court prosecutions are related to failed fiscal fines and because the statistics reveal nothing about the record or status of offenders being fined. Many will have a recent relevant criminal record or a track record of rejecting or failing to pay fiscal fines which may have made them unsuitable for a fiscal fine offer. On the other hand, procurators fiscal often told us that ineffectiveness of the system for

29 The Committee was unable to discover any recent figures on the proportion of cases of failed fiscal fines which are subsequently prosecuted. Data from work carried out in the mid-1990s suggested, however, that at that point around 80% of failed fiscal fines were subsequently prosecuted. The most common reasons for non-prosecution were that the offender had absconded or the case was time barred. (Peter Duff Fiscal Fines; the operation of Section 56 of the Criminal Justice (Scotland) Act 1987 The Scottish Office Home Department Central Research Unit, 1996).
enforcement of fiscal fines discouraged the offer of such fines in many instances. If they had had more confidence that fiscal fines would be effectively enforced they would have been willing to offer fiscal fines more frequently and at higher levels. On balance it seems reasonable to assume that around half of the cases currently prosecuted in the first instance and fined between £100 and £200 might be suitable for diversion if the fiscal fine was raised to £200. If the fiscal fine was to be increased to £500 the impact would be greater.

7.42 There is considerable potential to divert from prosecution a number of road traffic offences through the increased use of fixed penalties, but initiatives in that respect would relate to the reserved matter of road transport and would be outwith the competence of the Scottish Parliament. The Home Office has, however, recently changed the range of road traffic offences which can be dealt with by police fixed penalties, bringing offences which generated around 15,000 cases in the summary courts in 2001 within the ambit of diversion. There is a sharply increasing trend throughout the United Kingdom and in other common law jurisdictions in the use of fixed penalty notices and the like, replacing low level prosecutions with administrative sanctions. Again, not all of those who are (for example) currently prosecuted for lack of insurance will be suitable for an FPN, but a reasonable assumption might be that around 50% of those cases – 7,500 – would be suitable for diversion.

7.43 In addition, the proposal for fiscal compensation orders (see para 11.43 below) could remove a significant number of cases from the courts. On the assumption that at least 50% of the cases in which a compensation order forms a main or ancillary penalty could be dealt with through a fiscal compensation order, and that a significant proportion of certain other minor offences currently dealt with by prosecution and fine could be so dealt with, we estimated that between 5,000 and 10,000 cases could be diverted.

7.44 We also notice the potential impact of proposals in the Anti-Social Behaviour Bill for police to issue fixed penalty notices for a wide range of low level, anti-social and nuisance offending. We do not, however, think that these will greatly increase the numbers taken out of prosecution altogether: these are offences which would probably attract a fiscal fine at present.

7.45 In addition, our proposals for changes in the way in which fiscal fines and police fixed penalties are enforced – requiring the accused to opt into the court process or face a registered fine, plus a surcharge – are specifically aimed at reducing the number of failed fiscal fines which come to court. The table at
paragraph 11.18 shows that in 2002-03 around 17,000 fiscal fines – 50% of those offered – were not accepted. Research evidence suggests that around 80% of such cases were prosecuted. The available research on fiscal fines (see footnote 26) indicated that around 75% of those who had not responded to the offer of fiscal fine, and were prosecuted, simply pled guilty when their case came to court. Thus, a reasonable assumption for the impact of the change in enforcement arrangements might be 17,000 x 80% x 75% = just over 10,000 fewer prosecutions.

7.46 The cumulative effect of these changes, we estimate, would be that 30,000 to 40,000 cases – around 25% to 30% – should no longer require prosecution. These are the least serious cases calling in the courts. Around one-third are cases where a full court process had not been envisaged by the initial disposal, and the court was dealing with the failure of the initial attempt at diversion. If we can deal with that failure more robustly without prosecution it will greatly relieve the pressure on the summary courts.

7.47 Taken together, the effects of a downward movement of cases – more serious and complex cases appearing in the summary system – plus the effects of less serious cases being diverted out of the system, suggested to the majority of the Committee that there would be a decreased need for a class of judge imposing relatively light penalties. Even at the lowest end of the court spectrum there would be a requirement for significantly increased sentencing powers.

7.48 If the level below that of a sheriff summary court were to continue to be operated in the main by lay justices, most of the Committee would not be able to support the increase in sentencing powers which would be necessary, particularly if justices continued to sit as infrequently as many do at present, and singly. At present most lay justices, many will argue quite rightly, do not use the full extent of their sentencing powers. As noted above, only about 1% of sentences imposed in the district court by a justice of the peace are custodial. Many of the justices met by Committee members on visits to district courts said that they had never imposed a custodial sentence in their judicial career. Some of these said that they would be happy to do so in the right circumstances and with further training. The District Courts Association observed that justices would require

30 Peter Duff, Fiscal Fines; the operation of Section 56 of the Criminal Justice (Scotland) Act 1987 The Scottish Office Home Department Central Research Unit, 1996.
further training to deal with extensions in their sentencing powers, such as disqualification from driving.

7.49 Other justices, however, took the view that it was not the role of the lay justice to impose custodial sentences. The view of the majority of the Committee was that they would not support a system which envisaged substantially greater use of custodial sentences by lay justices.

7.50 A further aspect which is relevant to a potential increase in the seriousness and complexity of cases at the lower end of the summary court spectrum is the varying practice throughout Scotland of the number of justices who sit on the bench. In many district courts, particularly the urban courts, it is usual practice for justices to sit singly. In other district courts, some of which were visited by the Committee, such as Haddington, the practice is for justices to sit in threes. Arguments have been advanced in support of both methods, usually boiling down to the relative benefits of speed for the single justice as compared to ensuring greater consistency and value of spreading adjudication and sentencing decisions among three heads rather than one. Almost invariably the justices in each category took the view that their approach was correct and indeed some said that they would not wish to sit at all if they were obliged to change.

7.51 The Committee noted with interest the objections raised on grounds of practicality to the recommendations of the original 1973 White Paper for a unified lay justice court in which justices always sat in threes with a commitment to sitting days much in excess of that generally practised now. In the view of the majority, these objections would apply equally now. In addition, the difficulties which can arise with scheduling cases with three judges where a trial spills over a single day were highlighted by a number of district court clerks. Given that any increase in the complexity of cases at this end of the spectrum is likely to lead to more trials not being completed in a single day, it was felt by many on the Committee that this could pose problems for a system reliant on lay judges, particularly if sitting as a bench of three. It was also noted that three justices tend to take longer to reach a decision than one.

A Proactive Bench

7.52 Elsewhere in this Report (chapter 26) we take the view that one of the key challenges in delivering effective summary procedure is for the bench to take a more proactive role in managing the cases that appear before them. This need
will be accentuated as those cases become more complex and difficult and as
sentencing becomes more centred on individual offending behaviour.

7.53 The Committee could not find robust Scottish evidence as to whether a lay
judge is any less likely than a professional judge to take such a proactive role, but
there is some evidence from English studies to this effect. Research carried out in
England and Wales by Professor Rod Morgan “The Judiciary in the Summary
Magistrates Court”\textsuperscript{31} in 2000 found as follows:

“Stipendiary magistrates deal with all categories of cases and appearances
more quickly than their lay colleagues because they retire from court
session less often and more briefly ... They also deal with cases more
quickly on average ... This means that stipendiaries hear 22\% more
appearances than lay magistrates per standardised court session. If
stipendiaries were allocated an identical caseload to lay magistrates, it is
estimated that they would deal with 30\% more appearances.

The greater speed of stipendiaries is not achieved at the expense of inquisition
and challenge: on the contrary, hearings before stipendiaries typically involved
more questions being asked and more challenges being made.”

7.54 The research also showed that 45\% of appearances before stipendiary
magistrates led to adjournments compared to 52\% of appearances before lay
magistrates. This is both because stipendiaries were less likely to be asked for an
adjournment and because they were more likely to refuse a request. This degree
of variation, if replicated in Scottish courts, would become significant if a step
change in the level of case management is required from the bench and if it is
accepted that professional judges are intrinsically more likely to feel confident in
dealing with professional prosecutors and defence agents.

7.55 While there has been no comparable research carried out in Scotland
(which would be less easy to do than in England as there is only a very limited
number of courts where professional and lay judges deal with similar business),
the view that professional judges dealt more crisply and more robustly with cases
was supported in discussion with the professional organisations that work in the
summary courts – although not by justices themselves.
The Committee’s Conclusion:

7.56 A large majority of the Committee concluded, therefore, that the right approach was to move towards a wholly professional judiciary. The minority disagree, and their recommendations are set out in a note of dissent at annex A.

7.57 Before setting out in detail how it proposes such a judiciary should function, however, the majority considered it was important to deal with two particular objections which may arise – community participation and cost.

Community Participation

7.58 The first issue relates to the value of the link allegedly provided by lay justices between the criminal justice system and the local community in which the district is situated. However, the available statistics do not necessarily demonstrate a particular close match with the profile of the Scottish population.

7.59 The available data on justices of the peace in Scotland are set out below.

There are just over 3,800 justices of the peace in Scotland. Of this total:

- around 700 justices regularly sit on the bench;
- just under 1,100 (28.5%) of all justices are female;
- 8.3% of all justices are aged between 40-49;
- 24.7% of all justices are aged between 50-59;
- 27.1% of all justices are aged between 60-69;
- 38.6% of all justices are aged 70 and over.

7.60 Information on the social status and ethnic origin of justices is not collected. Similarly information about the extent to which justices live in areas which generate high levels of prosecutions is also not available. We were told by justices of the peace in both Scotland and England how difficult it is to recruit and retain younger justices who are in employment.

7.61 The majority recognised that it would, over time, be possible to achieve a closer match with the Scottish population. The majority was not, however, convinced that the effort and cost involved in this exercise would necessarily be the best way of improving community involvement in the justice system.
7.62 We noted with interest the piloting of local criminal justice boards chaired by the sheriffs principal. One possible model for a wider community involvement in the system would be for those boards to be supported by a local consultative forum, which could feed in views on blockages and delays to the local system and could also be a good opportunity for professionals and lay people to meet face to face and explore their understandings (and misunderstandings) of how the system works. Another model would build on the arrangements already in place in some areas for meetings between senior police officers, the procurator fiscal and representative groups from local communities.

7.63 Such a forum could also provide community views on a wider range of aspects including priorities and the policy decisions of the police and procurators fiscal. We commend this suggestion to the Executive as one worthy of development.

Cost Issues

7.64 The second issue relates to costs. The obvious assumption when comparing the likely costs of a wholly professional system with the present system is that the former system would be likely to be more expensive because of the need to pay salaries to and provide pensions for professional judges. It is, however, important to remember that each lay court has the support of a legally qualified court clerk, whose costs (as well as the costs of administration and overheads) need to be factored in.

7.65 Two pieces of research work are relevant to this issue: research conducted in England and Wales by Professor Rod Morgan (as above) and research commissioned by the Committee and carried out by Professor Frank Stephen of the University of Strathclyde in 2003.32

7.66 The English research is of limited application to Scotland, particularly because in the English context three magistrates sit as the norm whereas in Scotland justices more generally sit singly. It does, however, usefully highlight the issues which need to be taken into account:

“If only directly attributable costs (salaries, expenses, training) are considered, lay magistrates are much cheaper because they are not paid directly and many

32 This research is available on the Scottish Executive’s website: www.scotland.gov.uk.
do not claim loss of earnings. A sizeable minority do not even claim their allowable travelling expenses. A lay magistrate costs on average £495 per annum compared to the £90,000 per annum total employment costs of a stipendiary. These translate into a cost per appearance before lay and stipendiary magistrates of £3.59 and £20.96 respectively. When indirect costs (premises, administration staff etc) are brought into the equation, however, the gap between the 2 groups narrows, to £52.10 and £61.78.\(^{33}\)

7.67 The cost analysis above did not include opportunity costs – the costs of the loss to the economy of a lay magistrate’s participation in his or her normal business. When they were included, opportunity costs altered the balance to £70.80 per appearance before lay magistrates compared to £61.78 for a stipendiary magistrate. This is despite the fact that stipendiaries are generally agreed to deal with more complex and difficult cases which are liable to take longer.

7.68 The research conducted by Professor Stephen set out to use a statistical method to compare the financial costs of the different courts which dispensed summary criminal justice in Scotland – district courts, stipendiary magistrates’ courts and sheriff summary courts. The conclusions relevant to this part of the Report were that all district court commission areas have higher running costs per case than all the sheriff courts with the exception of those in Glasgow and Edinburgh. Even Glasgow and Edinburgh sheriff courts have lower running costs than most district court commission areas. Many sheriff courts were able to operate at a lower cost per case than district court commission areas even when the Scottish Court Service central costs, including capital costs and sheriff salary costs were included.

7.69 Professor Stephen’s research did not attempt to establish underlying reasons for the variations in cost between courts and commission areas. It is clear, however, that the steep fall in the number of cases dealt with by the district courts over the last 10 years is likely to have had a marked effect and to have left many district courts working well below their optimum case load, leading in turn to higher running costs.

7.70 Because of the complexities, neither of these pieces of research can be said to show conclusively that in general professional justice is “cheaper” than lay

\(^{33}\) Note 17, supra.
justice – or, indeed, the reverse. Professor Stephen’s work suggests, however, that in the particular Scottish context the sheriff courts are generally operating more efficiently and at a lower cost per case than the district courts. Thus lay justice does not currently seem to have a cost advantage in Scotland.

7.71 A final aspect relevant to the costs involved is consideration of potential costs associated with developing the present system of lay justice to a standard which the Committee would feel able to support. At the very least a substantial training effort would be required to ensure that lay justice was able to operate consistently across Scotland at the standard the Committee would like to see in terms of proactive case management; and further investment would be required if it was decided that justices were to sit as a bench of three in all areas. In other words, stand-still is not an option. All members of the Committee – including those who feel strongly that lay justice should be retained – agree that retention of lay justice would need to be accompanied by a substantial investment in recruitment, training and development.

The Majority View

7.72 The conclusion of the substantial majority on the Committee was that a number of factors led them to recommend that Scotland should now move to a wholly professional justice system. In summary, these factors were that:

i. If our other recommendations are accepted, there will be significantly fewer prosecutions in future for more minor offences which form the bulk of the current business of district courts. The future summary case load is likely to be substantially composed of more serious, more complex and longer summary cases than is the average for sheriff courts at present;

ii. If lay justice were to be retained the lay courts would have to have much greater sentencing powers if they were to take on a considerable proportion of the summary caseload and the lay justices would have to be prepared to use those powers. Otherwise the Crown would continue to choose to prosecute most summary cases before professional judges. Most of the Committee are not convinced that the increased sentencing powers which would be required are appropriate for lay justices;
iii. Lay justices would have to be prepared to make a major time commitment to justify the much enhanced training which would be required and the bench time which that training would imply. It would be even more difficult than it is at present to recruit justices who mirrored the profile of the Scottish population in terms of occupation, age and place of residence, especially if there were to be benches of three justices;

iv. There is a need to relieve pressure on the higher courts, which requires the lower courts to take on more serious cases. Hence at least some increase in sentencing powers for the judges in these courts is required;

v. The principal theme of this report is that the summary system needs to become more summary, and that in turn requires proactive judges willing to challenge defence and prosecution delays;

vi. The principle of community involvement in the criminal justice system is recognised as being valuable. But justices do not represent a full cross-section of the community and more representative ways of achieving this could be devised;

vii. It is not the case that a professional system would be significantly more expensive than the current system, especially when bearing in mind the relative speed of working of the types of judge and indirect costs.

A large majority of the Committee recommends that we move to a system that employs only professionally qualified judges. A minority on the Committee takes a different view and has submitted a separate note of dissent (annex A) to that effect.

Developing the New System

7.73 On the assumption that we should move to a unified system under the administration of the Scottish Court Service where professional judges hear all summary cases, the options are for sheriffs to deal with all summary business or for a new category of professional judge to hear all or some summary business.

7.74 It seems clear that in purely numerical terms (see paragraph 7.80) we would be close to a position where if no account was taken for the need to maintain
courts in any given location (in other words if each court was used to near its current maximum capacity) there would be nearly enough sheriffs overall at present to deal with all future summary business.

7.75 Clearly, however, this is an unrealistic proposition as there will always quite properly be a need to ensure the local delivery of justice. Cases cannot be moved around the country to suit the convenience of court schedules. There are a number of other arguments why this would not be a satisfactory solution.

7.76 First, as has already been mentioned, the context of this review includes the need to relieve the pressure on the higher courts. This implies a movement of cases from the High Court to the sheriff and jury court, and in turn a movement of cases from solemn to summary procedure. So those wider changes will increase the number of more serious offences with which the summary courts can and do deal.

7.77 In addition, while our recommendations will help to ensure that less serious offences can be dealt with effectively without coming to court, they will mostly impact on business currently dealt with in the district courts. We recognise that a substantial volume of summary business of the nature and level currently dealt with in the sheriff court will remain, as well as a reduced case load of the type currently handled in the district court.

7.78 We therefore need some extra judicial capacity in the system, not just to ensure that justice can be delivered locally but to avoid excessive pressure on resources at the summary end which might undermine our goal of quicker, more effective summary justice. At the same time, it is arguable that to use sheriffs to deal with all summary business, especially the high volumes in the urban courts, is an inefficient use of a highly qualified and highly paid judicial resource. We recognise that “district court” type work will remain, albeit there will be less of it.

7.79 We therefore think that there are good arguments for a new class of judge with a criminal jurisdiction which extended only to summary business. An “entry level” judicial post which could handle the more routine business would free up sheriffs to deal with the more serious cases including, in particular, summary cases which would previously have been handled in the solemn courts and those solemn cases which would previously have been prosecuted in the High Court.

7.80 The Committee is not able on the level of information currently available to specify the number of this new class of judges that would be required, although preliminary discussions with SCS suggest that initially it might be in the order of 20-25.
7.81 The Committee recognises that the primary requirement would be likely to be in busy urban courts where there is a sufficiency of summary business to keep a professional summary court judge busy, and where there is also solemn work as well as civil business for sheriffs to deal with. In rural areas where there may be less criminal business, it would make sense for sheriffs to continue to hear summary cases as well as solemn cases. In this respect the new judge would fulfil a role similar to that of the stipendiaries in the Glasgow district court.

7.82 The Committee has given some consideration to the name for the new type of judge. A number of options were put forward and discarded. Any term including the word “judge” such as “summary judge”, “community judge” or “district judge” runs the risk that the new posts will be seen as superior to sheriffs in the eyes of the public. There were also other drawbacks such as the fact that some of the new judges would probably be a national resource rather than a community or district resource. Stipendiary magistrate was considered as a reasonably accurate description of the function but the Committee preferred a new name to mark the change in arrangements. “Junior sheriff” and “sheriff depute” were also considered, but the Committee preferred “summary sheriff” as an accurate description of the job while remaining within the Scottish tradition that people look to the sheriff court for most local justice.

7.83 Turning to the criminal jurisdiction for judges in summary cases, including both sheriffs and summary sheriffs, the options considered by the Committee were:

- 60 days’ imprisonment, £2,500 fine (as for lay justices at present);
- 3 months’ imprisonment (6 months’ for repeat offences or cases involving violence or dishonesty), £5,000 fine – (as for sheriffs and stipendiaries at present);
- 6 months’ (12 months’ for repeat offences or cases involving violence or dishonesty), £10,000 fine (as for sheriffs under summary procedure in the Crime and Punishment (Scotland) Act 1997, but not yet brought into effect; £10,000 fine – taking account of inflation since the £5,000 maximum was introduced);
- 12 months’, £5,000 fine (as proposed for lay magistrates in England and Wales in the Criminal Justice Act 2003); and
- 12 months’, £20,000 fine (recognising that the power to imprison for up to 3 months has an associated maximum fine of £5,000 and that a fourfold increase in custodial powers should be accompanied by a similar increase in the maximum level of fine).
7.84 The first option was discounted by the Committee as it would not address the need to accommodate the pressure to move cases downward through the system to the lower courts, and there would appear to be no good reason why sentencing powers should not be at least as high as that of the stipendiary magistrates that currently sit in Glasgow district court. The Committee then considered the second option, which represents the status quo in the sheriff summary and stipendiary courts. In view of the increased seriousness of cases that will be heard in the summary system in future, this option was also rejected.

7.85 The Committee then considered the third option - the sentencing powers for sheriffs set out in section 13 of the Crime and Punishment (Scotland) Act 1997 which, to date, have not been commenced. The Committee noted in this context the intention to commence the sections of that Act relevant to sentencing under solemn procedure. However, the Committee believes that the sub-section relating to summary procedure does not go far enough. To limit the imposition of a 12-month sentence to repeat offences involving violence or dishonesty would unduly restrict the sheriff in dealing with more serious cases summarily. The most serious summary cases which are dealt with at present do not necessarily involve offenders with previous convictions involving violence or dishonesty. If this distinction was ever valid we do not think that it should be perpetuated. This option could frustrate the full range of proposals aimed to ensure that both the High Court and sheriff court are well placed to devote appropriate attention and effort to cases at the appropriate level and could lead to bottlenecks with cases being prosecuted at a higher level than they should be.

7.86 The Committee noted the provisions in the English Criminal Justice Act 2003 which has recently completed its Parliamentary stages for a general maximum sentence of 12 months as the maximum which English magistrates will be able to impose for a single offence (fourth option above). It agreed that 12 months was an appropriate sentence for summary judges to be able to impose. It felt, however, that the accompanying proposal of a maximum fine of £5,000 for the English magistrates was too low.

7.87 The Committee therefore recommends that, in order to equip summary judges with the disposals that will be necessary to deal with cases that will be heard summarily in future, they should be able to imprison for a period of up to 12 months and impose a maximum fine of up to £20,000 (maintaining the 3 months-£5,000 ratio) with no distinction in the maxima for a first or subsequent offence.

7.88 A fine of that order may be imposed more often on companies and businesses than on individuals. The Committee recognises COSLA's concern for
simple but adequate means of dealing with regulatory offences, and considers that a substantial increase in the fine level which summary courts can impose will help towards that end. Prosecuting businesses on indictment would expose them to the risk of an unlimited fine unless otherwise provided by statute. We can see considerable merit in enabling most cases in which the accused is a company or other form of incorporation being dealt with summarily. If an offender is sentenced to a period of detention or imprisonment of less than 4 years he or she is entitled to be released after serving half the sentence. Effectively a maximum sentence of 12 months detention or imprisonment really means 6 months. For professional judges sitting summarily, other than in England and Wales at present, the lowest maximum sentence which the Committee is aware of in Commonwealth countries and Northern Ireland is 12 months. Two years is not uncommon.

7.89 The Committee is aware of concerns about “sentence drift”, the suggested phenomenon whereby if judges are given higher sentencing powers there will be a general uplifting of the going rate for all offences leading to an increase in the prison population. Clearly this would be a matter of concern given the high prison population we have at present when compared to other jurisdictions. In proposing an increase in sentencing powers, we are clear that we do not intend any such uplift of the going rate for all offences, but rather we wish to extend the range of offences that can appropriately be dealt with in the summary courts.

7.90 However, we are not aware of any studies that have satisfactorily demonstrated this effect. In 1988 the sentencing powers of sheriffs sitting with a jury were increased from 2 to 3 years. While there was an increase in the proportion of sentences of between 2 and 3 years after this date, this was in line with a longer-term increase in the length of custodial sentences, which continued throughout the 1990s. For example, custodial sentences of over 3 years – High Court sentences – doubled as a proportion of the total between 1984 and 1999. The figures suggest that longer-term factors of political context count for more than jurisdictional change in influencing the length of sentences.

7.91 We therefore would not regard the theoretical risk of sentence drift as an adequate reason for failing to increase the sentencing powers of summary judges. In relation to the prison population, we note the creation and role of the Sentencing Commission and feel that the Commission, rather than ourselves, should address the issue of identifying more effective sentencing strategies to deter reoffending. We would also suggest that the Sentencing Commission keeps under review the effects of an increase in sentencing powers.
7.92 If, then, the sentencing power of sheriffs sitting summarily is to be increased, the Committee would take the view that there is no reason for there to be any distinction made between sheriffs and summary sheriffs. A different summary jurisdiction would not produce any advantages that we can think of, but it would undoubtedly lead to less flexibility in court management and scheduling.

7.93 There are a number of other aspects to the proposal to establish summary sheriffs that the Committee has considered, which are worth listing briefly.

7.94 The Committee thinks that there would be considerable advantage if the summary sheriff was conceived as a national resource rather than as a resource necessarily limited to a local jurisdiction. There are of course perceived advantages to a judge being aware of local issues. However, to the extent that this makes any difference in practice, we believe that it is counter-balanced by the argument that justice should be dispensed consistently. It was certainly our impression that the need for consistency was seen as being as important as the need for local sensitivity. Given these apparently competing claims, the Committee is of the view that the flexibility to deal with variations in workload suggests that while a summary sheriff should normally be based in a given locality, serving one or more courts in that locality, he or she should not be limited to hearing cases in that area only. However it would be possible to experiment in busy, predominantly urban areas with the concept of local community courts presided over by the same summary sheriff.

7.95 Not only would this further assist in court scheduling flexibility, it has also been suggested by a number of judges with experience of summary business that a constant diet of nothing but such business would lead to case-hardening and lack of job satisfaction. A civil jurisdiction would also help with the career path aspect discussed below. Summary sheriffs might be given jurisdiction to deal with summary causes, small claims, interdicts and matters requiring an urgent or early decision, for example, and power to deal with interlocutory matters.

7.96 The establishment of a post of summary sheriff could offer a first step on a career path that could progress to the position of sheriff and then High Court judge. At present there is no such career path, although it is noted that a lack of civil law experience could count against summary sheriffs progressing to the full shrieval bench. This development of a career path could have the effect of attracting younger people, women and people from ethnic minorities to become summary sheriffs, and in the process thereby creating a judiciary more representative of the population generally. It is noted by the Committee that there
would be likely to be an attraction for many of those who are currently employed as legally trained clerks in the district courts to apply to become summary sheriffs.

7.97 The Committee noted that moving to a fully professional summary bench would have implications for the legal aid system. Currently there is a differential between the amounts paid under the summary legal aid scheme to defence agents representing clients in the district courts compared to that paid for cases in the sheriff courts. We do not see any reason for there to be a differential between cases calling before summary sheriffs as opposed to sheriffs. The effect this proposal would have on the legal aid fund would require further consideration prior to its introduction – although it should be borne in mind that the range of proposals made in this report will impact upon the number and type of cases heard generally in the summary courts.

7.98 In proposing the new post of summary sheriff, the Committee is not of the view that this would lead to a cut-price version of the service delivered by sheriffs. We would envisage qualifications such as 5 or 7 years in practice as a solicitor or advocate. We are also aware that the salaries that would be required, while less than the £100,000 paid to sheriffs, would still need to be substantial. In this context we note that district judges in England and Wales, with a broadly similar jurisdiction, are paid approximately £80,000 and are subject to the recommendations of the Senior Salaries Review Body.

We recommend that there should be a new class of professional judge to deal with summary business where there is a need. That judge should be known as a “summary sheriff”.

We recommend that while summary sheriffs would normally be based in a given locality, they would not necessarily be limited to a particular local jurisdiction, and could be used flexibly to relieve pressure in other areas. We recommend that some might be appointed on a part-time basis.

We recommend that the criminal jurisdiction for judges in summary cases should be a maximum 12 months’ detention or imprisonment and a £20,000 fine. There is no reason for a distinction in this respect between sheriffs and summary sheriffs.

We recommend that consideration be given to summary sheriffs having some civil jurisdiction in addition to the criminal jurisdiction we have suggested.
Chapter 8

OPTIONS FOR THE POLICE IN RELATION TO MINOR CASES WHICH DO NOT REQUIRE TO BE REPORTED FOR PROSECUTION

Informal Warnings

8.1 In practice, the police receive reports of crimes and offences, which they will investigate, or they will themselves detect crimes and offences. Many incidents will be capable of resolution without the need to submit a report to the procurator fiscal. In some situations, police officers will decide to take no action, or will choose to counsel or to issue informal, verbal warnings, which are not recorded centrally. These are valuable options. Many minor offenders, particularly first offenders, will take very seriously such involvement with the police and not commit further offences. Prosecutors have given some encouragement to the use of warnings where appropriate and Her Majesty’s Inspectorate of Constabulary recently recommended\textsuperscript{34} the introduction of an adult police warning scheme.

Other Options

8.2 Other options may relate to the needs of offenders. We note that the Criminal Justice (Scotland) Act 2003 gives the Executive new power to fund arrest referral schemes, and that the Deputy Justice Minister recently announced additional funding to run pilot schemes over the next two years. Arrest referral schemes, commissioned by the local multi-agency Drug Action Teams, offer an opportunity to drug and/or alcohol users who have been arrested to engage with treatment or other appropriate services with a view to reducing their offending behaviour. They are a pathway into services from a criminal justice setting (usually a police cell or court premises) but participation is entirely voluntary on the part of the offender. Setting up such a scheme requires the kind of inter-agency co-operation which we have strongly supported elsewhere in this report.

8.3 Powers are also available to the police under the Mental Health (Scotland) Act 1984 to remove a person apparently suffering from a mental disorder from a public place to a place of safety to be examined by a doctor and for treatment arrangements to be made.

8.4 The Committee considered that the greater use of such options where appropriate would avoid the risk of offenders finding themselves in the criminal justice system when it is their health or social problems which need to be addressed.

8.5 In addition to the options set out above, the police have power to issue a limited range of fixed penalty notices (FPNs), which are considered further below.

Extending the Use of Non-Reporting Options

8.6 The prosecutor is currently entitled to direct the police not to report certain categories of offence where he or she considers that to be appropriate. This is an important aspect of his or her role, as the prosecutor stands in a pivotal position in the criminal justice system between the police and the courts, able to gauge the nature and volume of cases coming into it and to see what is happening in the courts. Consistent exercise of that power enables the police to deal with less serious offences without the need to refer to the procurator fiscal, and thus to give priority to reporting more serious offences to the procurator fiscal.

8.7 The delegation of decisions not to report to the police is in keeping with our proposition that decisions should be taken and implemented at the earliest stage in the system. But there ought to be reasonable consistency across the country in relation to types of case which the police are directed not to report, such as in relation to prostitution. We consider that the proposed criminal justice boards will help to address such problems in future.

8.8 The use of "non-reporting" options can avoid the need for further, possibly disproportionate action and we see clear benefits from enabling the police to exercise a wider range of options appropriate for minor crimes and offences. Providing these options should limit the number of cases reported to procurators fiscal and hence the number of cases coming to court.

8.9 We recognise that empowering the police to use these options may be perceived to raise constitutional issues. We consider though that an important safeguard is provided by the principle that where a penalty for a breach of the criminal law is being imposed, the accused should always have the opportunity to have the matter referred to court for determination of guilt. We consider too that the relationship between the police and the prosecutor enables the Lord Advocate and procurators fiscal to supervise the operation of non-reporting options and to pursue with Chief Constables any issues which arise.
8.10 Increasing the range of offences in which police officers may exercise a range of discretion and avoid the need to report to the procurator fiscal has advantages and disadvantages. We consider that the advantages outweigh the disadvantages. We recognise that an occasional misjudgement of the seriousness of an incident may preclude prosecution where this should have been the outcome and that a mistaken assessment of the sufficiency of evidence may lead to fixed penalty notices (FPNs) or warnings being issued inappropriately. We consider that these are issues which can be addressed by appropriate training in which we would expect prosecutors to be involved.

8.11 We are aware that not all police officers are happy to have the responsibility which these options confer on them as they consider that their role is to detect and report crime, not to make decisions relating to the most appropriate disposal for minor offenders. Some senior police officers were uncomfortable about complying with instructions not to report crime in view of the statutory duty on them to report crime. Some consider that being involved in administering disposals could undermine their other roles in the communities in which they work. There were concerns too about local perceptions of the police if they were seen not to report all crime. But the police already warn some offenders and issue fixed penalty notices to others. For relatively minor infringements of the criminal law, we consider that extending the range of “police alternatives” provides a proportionate and cost effective way of dealing with minor crimes and offences. In addition, we anticipate that the time saved by avoiding the need to prepare police reports and statements and, ultimately, attend court, will release police officers for other more productive duties.

**Formal Police Warnings**

8.12 We have considered whether there should be introduced a formal system of police warnings for minor offences. The issues which we identified as relevant to this consideration are:

- should such a warning require an admission of guilt on the part of the accused?
- should such a warning be referable to in any subsequent criminal proceedings?
- how would such a system operate within the context of the current system of procurator fiscal warnings?
8.13 We recognise that there are arguments in favour of a system of police warnings similar to the system of police cautions that applies in England and Wales. Indeed we understand that ACPOS would be in favour of such a system. The characteristics of the police caution system in England and Wales are that an admission of guilt is required and it can therefore be referred to in subsequent court proceedings. It remains an important principle that if an accused does not admit the offence, he or she should be given the opportunity to have the case heard in court if there is the possibility that the matter may be disclosed or referred to in subsequent proceedings.

8.14 However, we also need to bear in mind the current system of procurator fiscal warnings that operates in Scotland. The procurator fiscal can give a formal warning either personally or by letter. The warning proceeds on the basis that a report alleging a specified offence has been submitted to the procurator fiscal; that he or she considers that there is sufficient evidence to justify the taking of proceedings in court against the person concerned; that he or she has decided not to take proceedings in the particular case; but that should a similar report be submitted against the person in future, he or she might well take proceedings in court.

8.15 Such a warning does not require an admission of guilt. Where a warning is given, the Crown relinquishes the right to prosecute. No further criminal proceedings will be taken in respect of the offence, even where the warning takes place in the form of a face-to-face interview. The warning cannot be withdrawn at the insistence of an accused who denies the offence. For that reason, the giving of a warning remains confidential between the accused and the procurator fiscal and will not be disclosed (except in certain limited circumstances to a specialist reporting agency, or in subsequent court proceedings where the subject is raised by the accused or his or her agent). This information is recorded by COPFS, but not by SCRO.

8.16 In the past, each procurator fiscal maintained his or her own register of warnings at office level. Since most offenders operate in their local area, this was not seen to create a significant difficulty, but there remained the possibility that an offender might receive a number of warnings, each from a different procurator fiscal, ignorant of warnings given previously by colleagues in different court districts. Recording arrangements have now changed and the COPFS national database permits procurators fiscal to see the position across Scotland.

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35 Mowbray v Crowe 1993 SCCR 736.
8.17 The Stewart Committee felt that for procurator fiscal warnings there was no need for admission of guilt. Nor did they see an admission of guilt as necessary for formal police warnings, which they also recommended.

8.18 A system which required an admission of guilt for a formal police warning, while an attractive option in many respects, would run the risk of being seen as a more substantial sanction than that of a procurator fiscal warning, despite the fact that the latter represented a further step up the ladder of the criminal justice system. There could arise the situation where an alleged offender declined to accept a police warning which required an admission of guilt, only for the matter to be reported to the procurator fiscal and for the offender to receive a further warning not requiring any admission of guilt. We have considered whether in the circumstances to recommend a change in the status of the procurator fiscal warning, but have decided that given that that system appears to work well it would be better not to disturb it.

8.19 We take the view therefore that the best option for a system of formal police warnings in Scotland is not to base the system on a requirement for an admission of guilt. We accept that such a warning could not be referable to in subsequent court proceedings. It should, however, be recorded and available to police officers and procurators fiscal via SCRO to enable them to come to decisions about prosecution in future instances involving a particular offender. We recognise that it would not be appropriate for such warnings to lie on a file indefinitely and would suggest that they should be removed after a period of not less than 2 and not more than 5 years.

8.20 A recorded police warning would require the submission of some form of report to a senior officer. While this may simplify the reporting process, it will not eliminate it. However, such a report could be relatively brief and we consider that the crime report already prepared by the police would usually suffice. As it would be a report internal to the police, it would avoid the need to report cases to the procurator fiscal by preparing a full standard prosecution report (SPR). The offender should also be clearly advised, possibly by means of a written document, about the nature of the warning and the implications for future offending behaviour.

36 2nd report, paras. 3.16-3.18.
37 2nd report, para. 3.05.
We recommend that the police make full use of non-reporting options, and that guidance be issued by the Lord Advocate extending the types of offences which may be dealt with by the police on an informal basis.

We recommend that there ought to be reasonable consistency across the country in relation to types of case which the police are directed not to report. We recommend that the proposed criminal justice boards should address this issue.

We recommend the introduction of a system of formal recorded police warnings. These warnings should not require an admission of guilt. They should be accessible to police and procurators fiscal for a period of not less than 2 years and not more than 5 years from the warning. They should not be referable to in court proceedings.
Chapter 9

FIXED PENALTY NOTICES

Existing provision for Fixed Penalty Notices

9.1 The provisions of section 75(3) of the Road Traffic Offenders Act 1988, as inserted by Section 34 of the Road Traffic Act 1991, came into force on 1 July 1992. These provisions authorise police constables (and procurators fiscal) to issue conditional offers of fixed penalties “fixed penalty notices” – (“FPNs”) in respect of a range of road traffic offences (detailed in Schedule 3 to the 1988 Act, as amended). Operation of the police conditional offer scheme commenced on 1 January 1993. The Lord Advocate has issued guidelines to Chief Constables in relation to the use of fixed penalty notices. We consider it important that there is consistency across Scotland in the use of FPNs.

9.2 FPNs may be issued by traffic wardens for non-moving traffic offences, such as parking incorrectly and failing to display a valid excise licence. Police officers can also issue FPNs for a substantial number of offences including moving traffic offences, such as speeding, which is an endorsable offence. The amount of the penalty is currently £60 for endorseable offences and £30 for non-endorserable offences. They are payable in full within 28 days. When fixed penalties are not paid for offences which have not been decriminalised (as some parking offences have been) the case is referred to the procurator fiscal with a view to prosecution.

9.3 We are not aware of any concerns that the arrangements described above have proved to be other than satisfactory.

9.4 Following recent consultation by the Home Office, the following offences have been added to the range of offences which may be dealt with by FPN: 38

- no MOT (Road Traffic Act 1988, section 47) Penalty: £60;
- no insurance (Road Traffic Act 1988, section 143) Penalty: £200 plus 6 penalty points;

38 The Fixed Penalty (Amendment) Order 2003 and the Fixed Penalty Offences Order 2003, both made under section 51(3) of the Road Traffic Offenders Act 1988, came into effect on 1 June 2003.
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- failure to supply details necessary to identify an offending driver (Road Traffic Act 1988, section 172) Penalty: £100 plus 3 penalty points;
- failure to display a vehicle excise licence (Vehicle Excise Regulations Act 1988, section 33). Penalty: £60.

Extending the Scope of Fixed Penalty Notices

9.5 We regard FPNs as an appropriate means of dealing with low-level offending. They deal with such infringements in a swift, simple, effective and cost-effective way. They reduce demands on police time, preparing reports and taking offenders to a police station. They reduce the number of reports to procurators fiscal. They reduce the number of prosecutions. They reduce the numbers of people – both accused and witnesses – who have to attend court and ease the burden on the courts of processing such cases. They reduce the numbers of people having a criminal record. They have the advantage that they can be used in circumstances in which no proceedings of any kind might have been taken e.g. because of other pressures on resources. We are conscious of the growing expectation of the public that the “minor” anti-social crime which is most likely to affect them should be tackled effectively despite concentration at political and organisational level on the more serious and sensitive crime. We consider that such “minor” crime cannot be dealt with adequately without a significant injection of resources across the whole criminal justice system unless substantially greater use is made of alternatives to prosecution, such as FPNs.

On-the-Spot Fines in England and Wales

9.6 In England and Wales police FPNs, commonly known as “on the spot fines” in terms of the Criminal Justice and Police Act 2001, sections 1-11, have been piloted. The fines must be paid within 21 days or the offender must request a court hearing within 21 days of the notice being issued. If the recipient of the notice does nothing, the usual practice is to register the penalty as a fine at one and a half times the amount of the original penalty, but exceptionally there may be a prosecution. Payment involves no admission of guilt. Offences which may be dealt with this way include: threatening and abusive behaviour, being drunk and disorderly, misuse of 999 service, wasting police time, cycling on the pavement, dog fouling, and throwing fireworks. There has been a recent announcement that

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this scheme is to be extended to a wider range of anti-social offences including throwing litter, graffiti and some forms of bad neighbour behaviour, such as making too much noise. As has been noted, some road traffic offences have recently been added to the list for which such fines may be imposed. There can be little doubt that extension of such powers will widen the net of those who infringe the law and who suffer a penalty for doing so. However, there will be many who support that, especially in relation to obviously anti-social offences.

9.7 It is proposed to extend the scheme in England and Wales to include trespassing on a railway, throwing objects such as stones at trains or placing objects on a railway where there is no risk of injury to any other person, making a false report to the police, being drunk on a highway or other public place or in licensed premises, more minor breaches of the peace, buying or attempting to buy alcohol for consumption in a bar by a person under 18, wilful destruction of the highway by other than a vehicle and various contraventions of British Transport Police byelaws.

Extending the Scope of Fixed Penalty Notices in Scotland

9.8 We consider that it is likely that the numbers and types of offence in which FPNs can be issued will continue to increase. For example, the Antisocial Behaviour (Scotland) Bill, presently before the Scottish Parliament, contains proposals for FPNs to deal with several aspects of such behaviour, extending their application beyond road traffic offences. The extension of FPNs would require further police training which might include guidance as to what requires to be established to prove a charge: e.g. what “unnecessary obstruction” by a motor vehicle means.

9.9 We consider that the advantages of increasing the scope of FPNs outweigh the disadvantages. We have set out above some of the general issues surrounding increasing the non-reporting options available to the police and the extent of their use. In addition, we recognise that where an FPN is issued the offender will not be prosecuted unless he or she so chooses. He or she will thereby avoid a conviction.

9.10 There is anecdotal evidence that some of those who receive FPNs prefer to pay rather than risk prosecution, even though they consider that such a prosecution would not succeed. We have no evidence as to how often this may happen, although we doubt if it happens often. Clearly we do not want people who believe themselves to be innocent to accept a sanction, however, equally we
recognise that this is a potential problem where any part of the criminal justice system appears to offer different outcomes for accepting penalties or pleading guilty compared to being found guilty after a trial. However, taking into account the potential overall benefits to the delivery of justice our firm view is that the balance is in favour of, in effect, offering a discount on the penalty a court would impose in return for acceptance of the FPN.

9.11 We were told that where an FPN is issued and not paid, the police can have difficulty submitting a sufficiently well prepared report at a later date. This is because they will not have as much detail available to them as they would if they had intended to report the case from the outset. We consider that, if this is a real difficulty, it can be overcome partly by training but mainly by making the FPN itself explicit not only as to the time and place of the offence and the statutory provision contravened but also as to the conduct which constituted the contravention for which the FPN was issued. The Stewart Committee proposed such an approach in regard to road traffic FPNs.

9.12 The Committee had been considering the issue of whether FPNs should be extended to a wider range of anti-social and nuisance offences, but considers that the provisions in the Anti-Social Behaviour Bill largely overtake its separate consideration. Were those provisions not proposed as part of the initiative to tackle anti-social behaviour however, the Committee would still be in favour of introducing a range of FPNs for nuisance offences, in the interests of providing the most suitable punishment for the offence whilst ensuring that the system has sufficient capacity to deal effectively with more serious cases through prosecution.

9.13 However, the Committee believes that there is scope for extending FPNs beyond offences relating to personal anti-social behaviour to other statutory offences, particularly those of a regulatory nature – e.g. a range of the offences contained in the Civic Government (Scotland) Act 1982 (which covers local licensing issues and other matters relating to local amenity such as the obstruction of footpaths). The Committee recognised that a number of regulatory offences apply to other parts of the United Kingdom. Nonetheless we are aware of the recent extensions of FPNs in England and Wales to a number of non-road traffic offences. We consider that similar though not necessarily the same extensions should be considered for Scotland. FPNs do not need to be used in every case when an offence which may be dealt with by an FPN is committed but the ability to deal with such infringements by FPNs in suitable instances will contribute to the increased flexibility the summary criminal justice system in
Scotland urgently requires. More extensive use of FPNs as an alternative to other reporting options would require some change of culture both by the police and procurators fiscal but the advantages appear to outweigh the disadvantages. They are a simple and effective way of dealing with minor infringements without requiring resources other than those of the police.

**Penalties Imposed by Government Departments**

9.14 A number of government departments have the power to impose penalties. For example the Inland Revenue and Customs and Excise can and do impose (sometimes very large) penalties for failure to comply with laws within their own field. The Department for Transport can issue penalty notices for some infringements, for example using red diesel in private cars. While we note that most of such penalties will be imposed under statutory regimes reserved to Westminster under the Scotland Act, we take the view that such departments should be encouraged to use these powers to the full where appropriate. We were told that, in some cases, the departments with such powers prefer to report breaches of the law in their field to the procurator fiscal, and in effect use the court as a form of debt collection service. We heard, for example, about instances where courts were asked to take criminal sanctions against individuals for a month’s back duty on car tax or for not having a TV licence. We are not suggesting that such infringements should be allowed to pass unchecked. However, it seems to us that in many instances the government department or agency concerned should take action itself, allowing the courts to concentrate on more serious breaches of the criminal law.

**Opting Into or Out Of the Scheme**

9.15 We consider for the future that, in principle, it should be necessary for the person to whom an FPN is issued to take positive action, if he or she wishes to contest the issue in court. In other words, to “opt out” of the fixed penalty scheme, he or she should be required to complete and return a form indicating that the notice is to be contested. If the offender chooses to do nothing, the FPN will become a registered fine on the lapse of a fixed period. Further, we recommend that all unpaid FPNs which are registered as fines should be registered at the sums shown on the FPN with a 50% increase. Fixed penalty notices would require to be redrafted so as to set out the rights and obligations applying to them in clear terms. We discuss this approach (and issues relating to service of penalties, including FPNs) in more detail in the section on fiscal fines, from paragraph 11.21.
Prosecution Following Rejection of the FPN

9.16 If the credibility of the scheme is to be maintained, we recommend that where an offender challenges the FPN, prosecution should be inevitable unless there are evidential reasons or public interest considerations which justify taking no further proceedings in the case. We recognise that this recommendation may have significant resource implications for the agencies involved in those cases in which there is a challenge but the overall numbers of FPNs which result in a prosecution should be markedly lower.

Informing the Court and Others of the Offer of a FPN

9.17 Conscious of the possibility that some offenders will fail to accept the offer on the basis simply that a court may impose a lower amount on conviction, even where guilt is not contested, we recommend that, where an accused is convicted having declined the offer of a FPN, the court should be advised of the amount of the offer made and declined and that the court may take this into account when imposing sentence.

9.18 At present, when the offer of a fiscal fine is accepted, the Crown is generally prepared to disclose the disposal of the case to any person having a legitimate interest in knowing its outcome, for example, the victim. The Committee believes that similar information should be made available to interested parties when a case is disposed of through the offer of a FPN.

9.19 We recognise that there is a risk that a more persistent offender will receive successive offers of alternatives to prosecution, when perhaps he or she should have been prosecuted. We consider though that this will be capable of being addressed by recording the use of such alternatives nationally. We do not believe that it is wrong in principle for there to be more than one offer of an alternative to prosecution in relation to a particular offender provided that these may be brought to the attention of the court in the course of a prosecution for a further offence. If any restriction was to be imposed that only one alternative could be offered within a prescribed period this could lead to minor offending being prosecuted in court inappropriately.
We recommend that consideration be given to increasing the scope of FPNs to a number of non-road traffic offences. The scope for extending the use of FPNs to other statutory offences, particularly those of a regulatory nature, should be explored.

We recommend that, in a subsequent prosecution for a similar offence, the Crown should be able to refer to previous FPNs that have been imposed in relation to similar offences committed by the accused in the past.

We recommend that when a case is disposed of through the offer of a FPN the disposal of the case should be disclosed to any person having a legitimate interest in knowing its outcome on request - for example, the victim.

We recommend that it should be necessary for the person to whom an FPN is issued to take positive action, if he or she wishes to contest the issue in court. If that person chooses to do nothing, the FPN will become a registered fine on the lapse of a fixed period.

Further, we recommend that all unpaid FPNs which are registered as fines should be registered at the sums shown on the FPN with a 50% increase.
Chapter 10

REPORTING TO THE PROCURATOR FISCAL

10.1 In considering a case, the procurator fiscal has to assess if what happened amounted to one or more crimes or offences, and if so which one(s). The police report has to be sufficiently comprehensive to enable him or her to decide if any crime or offence was committed and, if so, whether and whom to prosecute. Scottish criminal law retains the requirement for corroboration and the report must disclose whether there is corroborated evidence of each charge against each accused. The prosecutor will assess the strength of the evidence having regard to the likely reliability and credibility of the available evidence. Having established what crimes were committed and by whom, the procurator fiscal must assess their seriousness and select the appropriate course of action. In most cases, this will be prosecution in court, but there are a number of alternatives to prosecution and he or she will decide on the basis of which option would serve the public interest best. To do so, he or she must have information not only about the crimes themselves, but also any background to them, any criminal record of the accused and any other information about the circumstances of the accused or victims which may influence his or her decision. In selecting the prosecution route, he or she will choose the appropriate level of court.

10.2 If the case is being prosecuted in court, the procurator fiscal must go on to decide which charges to libel and what specification needs to be included in the charges. If in any prosecution the charges are wrong, this is likely to create difficulties in leading evidence in any trial and at worst could prevent the accused from being convicted.

10.3 Where the accused appears in court from custody, the report must include information which may be relevant to consideration of whether the prosecutor should oppose bail or agree bail subject to certain conditions being imposed, and what these conditions might be.

10.4 If the accused person pleads guilty, the procurator fiscal will base his or her narration to the court on the information provided, including information about any compensation which the accused might be ordered to pay.

10.5 The extent of the information required by procurators fiscal is reflected in the format of the reports submitted by police and other reporting agencies in Scotland. Reports by the police are submitted electronically to procurators fiscal in a standardised format known as the standard prosecution report (SPR). This format has been agreed within the Integration of Scottish Criminal Justice Information Systems (ISCJIS) structure and is designed to ensure that ISCJIS data standards and the needs of procurators fiscal are met as set out above. We understand that discussions are presently under way to have this format adopted by all agencies reporting to procurators fiscal and to secure electronic reporting by them.

10.6 The SPR format includes the following sections:

- **case number** (generated automatically);
- **case details**: date of receipt of police report (generated automatically); police lead incident number; the date of the first offence;
- **accused details**: name, address, SCRO no. (“S no.”), sex, date of birth, age, custody status, DVLA no. (if relevant);
- **charge details**: draft charges are generated under charge codes agreed within the ISCJIS community and include, for each charge, the date of caution and any aggravation, e.g. if the accused is allegedly in breach of bail conditions or if the offence is racially aggravated. Some aggravations are included for statistical purposes, e.g. domestic violence, which may not be apparent on the face of the charge.

- **SUMMARY SECTION**
  - **antecedents** - information about accused personal and employment information, where provided to the police;
  - **description of locus**;
  - **description of events**;
  - **caution and charge/ reply details**;
  - **analysis of evidence/ identification of accused**.

- **REMARKS** - comments which the reporting officer considers may have a bearing on the prosecutor’s decision;
- information about any productions or case related documents in the case (Productions are listed separately in a pro-forma production release note which is used to authorise their release on conclusion of proceedings);
- **reporting and supervisory officer details**;
- **witness details** (a list of potential witnesses with addresses, including leave, etc.).
list of pending cases and previous convictions;
• other sections are included where appropriate, for example, if the
offences are racially aggravated, information about the ethnic origin and
interpreting requirements of the accused and/or witnesses is included; if
the offender is liable to disqualification, a form is provided for the
assistance of the police officer in court.

10.7 Witness statements are normally not submitted at the time of initial
reporting, although they may be in complex cases or where the procurator fiscal
wishes to clarify an important detail of evidence.

10.8 In our visits to the Netherlands and to England, we were shown examples
of the form of report submitted by police to the relevant prosecutors in those
jurisdictions. The simplicity of these reports was in sharp contrast to what is
required in Scotland. In our consultation, both police officers and some
procurators fiscal described the standard form of police report as being more
comprehensive and longer than it need be in a large proportion of cases. It was
criticised as being repetitive. Its preparation is time-consuming for police officers.

10.9 We acknowledge that the submission of reports of crime by the police to
an independent prosecutor is an integral part of our system of criminal justice and
provides a safeguard to those persons who may be wrongly accused. We
acknowledge too that it is a matter for the Crown to direct the police as to the
format and content of their reports. We consider though that the preparation of
full police reports in every case for submission to the procurator fiscal with an
initial report is not a good use of police time. Prosecution does not follow in a
substantial proportion of police reports submitted to the procurator fiscal (35% of
cases reported to the procurator fiscal in 2002-3 did not lead to prosecution,
including 17% of cases in which there were no proceedings) and we consider that
the resources involved in preparing these could be better targeted. We
understand that a great deal of work has already been undertaken with a view to
developing abbreviated reports in at least some types of case – and that a degree
of local freedom will be retained to determine the relevant categories of offence.41
While that is welcome we believe that there will be scope for abbreviated reports
to be prepared in a greater range and number of cases than is presently

41 Recommendation 18 of the ACPOS/COPFS joint protocol on police reports, states that “Area fiscals and
Chief Constables should identify categories of offences in respect of which they agree that they may be
reported in an abbreviated format. Any such agreement should be reviewed annually as should the
capacity to extend it to other offences.”
anticipated. We recognise that police officers are not lawyers and may not fully appreciate the nuances of evidential requirements, but we consider that the provision of further training for police officers and the development of closer links between operational staff in both organisations may assist them to focus on the essential information in cases, thereby simplifying and shortening reports and reducing what appeared to us to be wasted effort. We suggest that the use of abbreviated reports be kept under review by criminal justice boards to ensure that the most effective use is made of police and COPFS resources.

10.10 We recognise that much of the additional information required in Scotland (and hence the complexity of police reports) results from the application of the corroboration rule in criminal cases. The corroboration requirement also impacts on the amount of evidence and hence number of witnesses and productions which may be required in any prosecution. That said, the principle of establishing the case against an accused with corroborated evidence is a fundamental element of our current criminal justice system and could only be reviewed in the context of a wider review of the law of evidence in all criminal cases.

**Reporting Arrangements**

10.11 As indicated above, police reports are now transmitted electronically to the procurator fiscal. Scotland is well ahead of many countries in the use of information technology for the management of cases and transmission of data between the various agencies involved in the process. The system is managed by ISCJIS, an umbrella system comprised of the various participants, namely the police, prosecutor, courts, SCRO and other agencies, including, for example DVLA. The system will become more sophisticated and useful once COP II is in operation.

10.12 Each accused has a unique identifying reference number, allocated by SCRO. Each crime or offence is also allocated a unique number and is identified by a specific charge code and where applicable, aggravation. This means that cases can be tracked round the criminal justice system and regardless of what happens to the charges, individual offences and their outcomes can be identified.

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42 The COP (criminal operations) system is the IT system used by the Scottish Court Service to manage criminal court business. COP II will be the successor system that is currently under development and is due to be rolled out to every sheriff court by 2006. It will be a more advanced system, offering increased functionality and potential.
Timeliness of Reporting and Commencement of Proceedings

10.13 In the past, the police aimed to report offences to the procurator fiscal within 6 to 8 weeks. That target was rarely met. We were informed that it was not uncommon to find cases reported to procurators fiscal after the passage of considerable periods of time – up to several months. This caused problems for cases subject to statutory time bars and on occasions restricted the potential to use alternatives to prosecution in these cases since by the time the period for acceptance had elapsed, the case might well be time barred. Additionally, for less serious crimes, the passage of time could mean that prosecution was no longer in the public interest.

10.14 In recent months, in response to public concern about delays in the criminal justice process and the developing approach of the courts on delay in light of the jurisprudence under the European Convention on Human Rights, the target has been reduced to 4 weeks and police forces around Scotland are tackling backlogs as a matter of priority. We address the issue of overall targets for the summary justice system in chapter 33.

Police Reports in Custody Cases

10.15 We heard concerns that in many courts the time when custody cases call in court has become later over time. Whereas it used to be common to call custody cases at 10 a.m., these cases now tend to call some time after noon, often not before 2 p.m. in some courts. The present arrangements developed in response to the variability of arrival of police reports at the fiscal’s office and the consequent inconvenience caused to agents and to the courts. Ensuring that custody cases are dealt with earlier in the day would reduce the cost of detaining accused as they would be detained for a shorter time and, if sentenced to imprisonment or remanded in custody, they would be removed to prison earlier. Solicitors would not have to wait at court so long for complaints to be served and cases called. Family and friends of those in custody would spend less time awaiting their release or news that they have been remanded in custody.

10.16 The numbers of cases reported in custody are highly variable though higher numbers can be anticipated following certain events and, often, public holidays. This places acute pressure on all of the organisations involved with them.

10.17 Where an accused is detained in custody, he or she must be brought before the court on the next lawful day. To achieve this, the police report must be
dictated, typed, revised and reported to the procurator fiscal as soon as possible. Most custody cases relate to more serious and sometimes more complex crimes. The proof of crime generally is becoming more complex, especially with increased reliance on scientific techniques. Summary complaints are brought only where the prosecutor is satisfied that there is a corroborated case and so, where for example forensic evidence is an element of evidence, the result of any analysis must be available (or at least there must be a certainty that it will be available for the trial) before the prosecution is commenced. Additional complications include issues of bail. In view of the limited time available for further inquiry, it is important that reports are comprehensive and accurate. Errors or omissions may prejudice any prosecution and leave victims and witnesses at risk, if, for example, issues affecting a proper consideration of the appropriateness of bail or a custody remand are unclear or incomplete.

10.18 In order to deal with custody cases as quickly as possible the arresting or reporting officers must be taken off other duties, including patrol duties, to prepare and dictate the report. Typists need to be available at unsociable hours or at weekends to type them. Case management staff or supervisors need to be available to review cases as necessary and to obtain any further information required. By the time the case gets to court, the officers involved are likely to be off-shift.

10.19 In the same way that these cases create pressure on the police, they create pressure for procurators fiscal. Procurators fiscal have arrangements whereby available staff will assist with the marking of custody reports before they go on to their other duties. However, the cover provided by staff with court duties is available for only a short time and they may have to leave the office by 9 a.m. or 9.30 a.m. depending on local court starting times. Offices have a small core of legal staff dealing with other aspects of office work who will divert their attention to any reports which arrive late. Typically, the most complex cases are more likely to arrive late. These are likely to be the very ones which require further inquiry by the procurator fiscal and delays become compounded.

10.20 We recommend that the police, procurators fiscal and courts work together closely to identify ways of speeding up the process. This is a national problem but it would be best addressed through local solutions. General practices that will lead to better performance include ensuring:

- that reports are sent to the procurator fiscal as early as possible in the day;
• that there is capacity in the procurator fiscal’s office to deal with those reports before routine court business for the day commences; and
• that local criminal justice boards play an active role in monitoring performance and driving improvement in this area.

Regulatory Cases

10.21 In the responses which we received to our first order consultation and in the course of consulting COSLA we were urged to recommend improvements in the prosecution of environmental and other similar offences of a regulatory nature which arise in relation to the responsibilities of local authorities. Examples include breaches of planning legislation, trading standards, pollution and food hygiene offences. There are a number of other specialist agencies responsible for sending reports to the procurator fiscal in relation to particular offences – e.g. H.M. Customs and Excise, the Health and Safety Executive and the Scottish Environment Protection Agency. Procurators fiscal told us that all too often the reports which they received were not sufficiently well prepared to enable a prosecution to be commenced. In a number of other jurisdictions, some of which were visited by members of the Committee – notably the Netherlands – there are specialist environmental prosecutors who have built up considerable knowledge and expertise which enables them to deal effectively with such offences. While we consider that we have identified a problem which could with benefit be constructively addressed, it is a problem which at best is close to the margin of our remit. It might first be addressed in discussions between the Crown Office and Procurator Fiscal Service, COSLA and, where appropriate, other specialist reporting agencies, to identify current weaknesses and the action which would most effectively deal with them and we so recommend.

We recommend that the obligation to prepare full police reports for submission to the procurator fiscal in every case be reviewed as it is not an effective use of police time. We believe there is scope for abbreviated reports to be prepared in a range of cases and note the recommendation in the ACPOS/COPFS joint protocol on police reports on this matter. We suggest that the use of abbreviated reports be kept under review by criminal justice boards to ensure that the most effective use is made of police and COPFS resources.
We recommend that steps are taken to ensure that custody cases are dealt with earlier in the day. We recommend that the police, procurators fiscal and courts work together closely to identify ways of speeding up the process - and that their joint efforts be monitored by local criminal justice boards.

We recommend discussion between the Crown Office and Procurator Fiscal Service, COSLA and other specialist reporting agencies on what needs to be done to secure the consistently effective prosecution of environmental and other similar regulatory offences.
Chapter 11

ALTERNATIVES TO PROSECUTION

11.1 We considered carefully the scope to provide the most appropriate disposal having regard to both the offender and the offence through increased use of alternatives to prosecution. This consideration was in the context of a system in which alternatives to prosecution have been increasingly used and cases processed through the summary courts have been in consistent decline (as evidenced by the figures in the table at paragraph 4.27). Over the 5-year period 1997-2002, for example, the number of persons proceeded against in the summary courts fell from 166,000 to an estimated 133,600, largely due to a substantial reduction in district court business, but also no doubt affected by industrial action at Glasgow district court in 2000-1 (the sheriff summary figures declined until 2000, but then rose sharply again, returning to a level similar to that in 1997).

11.2 Over the same period the figures show that non-court disposals including fiscal fines have played a significant part in the shift towards dealing with offences rapidly by diversion from prosecution rather than through the court process.

Distribution of action taken on cases closed, involving non-court disposals
11.3 Figures also show, however, that reports to the procurator fiscal over the last year have been running at a consistently higher level. This is expected to feed into a significantly higher level of business in the summary courts in 2003-4.

11.4 The drivers for an increased focus on alternatives to prosecution are therefore more complex than (for example) those which applied when the Stewart Committee\(^4\) reported 20 years ago on the same topic. Their context was a steady and apparently inexorable rise in the business of the summary courts – from 220,000 persons proceeded against in 1970 to 260,000 in 1980. The introduction of the fiscal fine which they recommended and the increase in other forms of diversion mean that today we already have a more flexible range of options available to the police and the procurator fiscal.

11.5 We consider, however, that it remains important to focus on making alternatives to prosecution more widely available, more flexible and more robust.

11.6 We have to recognise on the basis of the analysis in chapter 2 that the summary court system is far from summary in its effects. This impacts not only on system efficiency, but also on the effectiveness of the justice delivered. Where there is a long gap between offence and disposal, the offender may be less likely to perceive the clear link between the two and perhaps be less likely to modify his or her behaviour. For many less serious offences an appearance in court with the full panoply of a criminal prosecution is neither the most efficient use of resources nor the approach most likely to nip low level offending in the bud.

11.7 We also recognise that while the numbers dealt with by the summary courts have recently declined, more proactive policing to deal effectively with anti-social behaviour in particular is likely to generate not only more police fixed penalties but also an increase in reports to the procurator fiscal. We need to ensure that the criminal justice system as a whole has the range of options it needs to deal with the range of crimes and offences which disrupt our civil society. We also need to ensure that the system can deal effectively with increased numbers of crimes and offences, without bottlenecks developing that lead to a slowing down of the summary justice system once again.

11.8 We were conscious also of the need to maintain public confidence in the way in which we deal with minor offenders. In the public survey which we commissioned we tested how far the use of alternatives to prosecution would be acceptable to the public. This survey showed that 60% of those questioned were in favour of alternatives to prosecution (as described to them in the course of the survey) with only 25% opposed to their use.

11.9 Our strategy is therefore to enable the courts to focus on more rapid handling of the more serious crimes and offences and those cases in which court ordered disposals are likely to have a beneficial effect on offending behaviour, while giving police and procurators fiscal the range of powers they need to respond quickly and appropriately to more minor offences, helping to forestall their escalation.

11.10 We have identified a number of principles which contribute to successful alternatives to prosecution:

- clear guidelines on their use;
- clarity in the minds of the police/procurator fiscal and the alleged offender about what the alternative means: for example, is prosecution still an option when diversion fails and on what timescale/terms?
- sanctions which make the diversion effective;
- avoidance of a formal criminal record wherever possible; but also
- capacity in the management information system to retain information about alternatives used, so that if an alleged offender reappears in the system the police, procurator fiscal and courts can decide how best to deal with a new offence in the full knowledge of approaches already adopted.

**Fiscal Fines**

11.11 The fiscal fine was established by s56 of the Criminal Justice Act (Scotland) 1987. It 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. The levels of fiscal fine have been set by an order of the Secretary of State and are currently £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 offered 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 (but not its amount) can be disclosed to the court upon conviction in that case. Where a previous fiscal fine has been accepted, however, this fact is not routinely made known to a court before which the alleged offender appears in respect of other offences.

11.12 It is clear that since its inception the fiscal fine has been responsible for a significant reduction in the numbers of cases that would otherwise have been dealt with in the summary courts. The tables at paragraphs 11.13 and 11.18 demonstrate that a large number of less serious cases are now dealt with by the offer of a fiscal fine – and that, in around half of those cases, that offer is accepted.

11.13 Prior to 1996-7 the fiscal fine was fixed at a single level of £25. This was subsequently changed to variable levels of £25, £50, £75 and £100. The table below shows fiscal fine offers issued (i.e. offered but not necessarily accepted) since the introduction of the four levels. These data are not available for the previous years. It would appear from the table that, although the use of the higher level fiscal fines has increased since introduction, there has not been an overall increase in the number of fiscal fines issued and that the increased use of higher levels has been at the expense of lower level fiscal fines.

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Fiscal Fine Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>£25</td>
</tr>
<tr>
<td>1996-7</td>
<td>23,930</td>
</tr>
<tr>
<td>1997-8</td>
<td>25,702</td>
</tr>
<tr>
<td>1998-9</td>
<td>23,843</td>
</tr>
<tr>
<td>1999-2000</td>
<td>19,057</td>
</tr>
<tr>
<td>2000-1</td>
<td>18,678</td>
</tr>
<tr>
<td>2001-2</td>
<td>17,739</td>
</tr>
<tr>
<td>2002-3</td>
<td>18,501</td>
</tr>
</tbody>
</table>

11.14 The Committee considered that there might well be scope to increase the use of fiscal fines. Looking at the existing legislative framework for such fines, however, against its framework of principles (see above) it identified several areas in which the fiscal fine as currently operated falls short of the clarity and robustness an effective alternative to prosecution requires.
Status of the Fiscal Fine

11.15 Previous fiscal fines imposed on an accused are not made known to a court before which an alleged offender subsequently appears on another charge. This leads on occasion to such a person being treated as a “first offender”. Though technically correct, that was identified as a shortcoming within the system in consultation responses and on court visits. There is at present no central register of fiscal fines offered and accepted, although we understand that the new COPFS IT system will retain this data. At present it is not known to a procurator fiscal whether any other procurator fiscal has offered a fiscal fine to the same person.

11.16 It is recognised that acceptance of a fiscal fine is not an equivalent of admission of guilt, and that it would not be desirable further to increase the percentage of the population who have a formal criminal record. Nonetheless, it is considered that it would be proportionate to inform an accused person that, in accepting a fiscal fine, he or she should be aware that the court might be informed of that fact if it was relevant in a future case. Information about fiscal fines accepted should also be available to the police and to procurators fiscal so that their consideration of the action to be taken when someone re-offends can be taken in the light of all the facts of the case. Such information is in fact routinely recorded at SCRO at present, as a result of automatic updating through ISCJIS. Fiscal fines are appended as a separate list.

11.17 Proportionality is important here: it would not be reasonable to inform the court of a 10-year-old fiscal fine in relation to a subsequent prosecution for a minor offence. On balance, therefore, we recommend that the offer of a fiscal fine should be amended to state clearly that the non-acceptance of the offer may be disclosed to the court in connection with any prosecution for the offence alleged, and also that acceptance of the offer may be disclosed to any court in connection with any other current or subsequent proceedings commencing within a certain period, of at least 2 but no more than 5 years (c.f. similar proposal in relation to police recorded warnings in paragraph 8.19).

Ensuring that the Fiscal Fine is Paid

11.18 Currently, if only the first instalment of the fiscal fine is paid, the offer of a fiscal fine is deemed to have been accepted and the possibility of prosecution for the offence is removed. Civil diligence procedures are then required to enforce payment.
Alternatives to Prosecution

Collection of fiscal fines

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Number offered</th>
<th>Number accepted</th>
<th>Number fully paid</th>
<th>Number fully paid as percentage of number accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000-1</td>
<td>33,233</td>
<td>13,715</td>
<td>12,723</td>
<td>89</td>
</tr>
<tr>
<td>2001-2</td>
<td>34,006</td>
<td>13,995</td>
<td>12,844</td>
<td>92</td>
</tr>
<tr>
<td>2002-3</td>
<td>34,697</td>
<td>17,648</td>
<td>13,985</td>
<td>79</td>
</tr>
</tbody>
</table>

Source: annual statistical returns from district court

1 Data not available for some district courts, as detailed below.

2 Percentage calculated only for those courts where data available for both number of fines accepted and number of fines fully paid. (Glasgow, which is not included in the 2000-1 and 2001-2 calculation, will represent a sizeable percentage of the overall figures.)

Missing district court data on fiscal fines

<table>
<thead>
<tr>
<th>Number of fiscal fines offered</th>
<th>2000-1</th>
<th>2001-2</th>
<th>2002-3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Edinburgh</td>
<td>Argyll and Bute, Edinburgh, Glasgow</td>
<td>Fife, Glasgow, Stirling</td>
<td>Eilean Siar, Stirling, West Lothian</td>
</tr>
<tr>
<td>Stirling</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eilean Siar, Stirling, West Lothian</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

11.19 The figures suggest that the payment rate of fiscal fines is in fact fairly high, although it varies very much across the country (the figure for Glasgow in 2002-3 was 55%). But where fines are not paid, enforcement mechanisms are not particularly robust. Civil diligence is expensive and in the context of a fiscal fine of perhaps £50 is regarded by many in the district courts (which enforce fiscal fines) as not to be worth undertaking. In some areas it is therefore common knowledge that there is no risk of prosecution and little prospect of enforcement once a first payment has been made. The Committee considered that if fiscal fines were to be used more widely this issue had to be addressed.
11.20 We examined the arrangements which are available to prosecutors in the Netherlands. There, the prosecutor may offer a prosecutor fine, which gives the offender a period of time in which to pay the penalty in full. The document also serves as a form of summons, and if the penalty is not paid by the specified date, the case will automatically call in court. We considered that this procedure would offer no significant improvements over the present arrangements, i.e. it would tend to encourage inactivity on the part of the accused and lead to cases ending up in the court process where the issue was not necessarily proof of guilt or innocence. Inactivity on the part of those offered fiscal fines causes significant additional resources to be deployed, especially in relation to those that have chaotic lifestyles. By and large they will be prosecuted, usually in the district court, where they will eventually plead guilty in most cases (see paragraph 7.45). This is a second process and a further expenditure of resources for a relatively minor offence.

Opting In or Out of the System

11.21 There are two alternative approaches when an offer of a fixed penalty or a fiscal fine or compensation offer is made. On one approach the alleged offender can accept the offer, with refusal of the offer or inaction leading to prosecution (in this context seen as “opting in” by acceptance of the offer). On that basis inactivity is seen as amounting to the same as refusal of the offer. On the other approach the alleged offender is seen as accepting the offer unless he or she elects to be prosecuted (in this context seen as “opting out” of acceptance of the offer). On the latter basis inactivity is seen as amounting to the same as acceptance of the offer. We are led to believe that many of those to whom offers are made take no action in relation to them. That seems to us to be confirmed by the numbers who are later prosecuted and eventually plead guilty.

11.22 We consider that those who are alleged to have breached the criminal law and who wish to have the matter heard in court can reasonably be expected to express a wish to exercise their right to have their case heard by a court. Provided that the alleged offender has been duly informed of the action to be taken against him or her, he or she can exercise his or her right to a hearing by completing and returning a form. In other words the alleged offender can, and in the opinion of a majority of the Committee should, be required to elect to be prosecuted. On that approach if the individual does not actively request a court hearing and the offer is simply ignored it would be treated as if it had been accepted. Failure to pay would then result in the normal procedures for fine enforcement applying automatically. In line with our commitment to clarity, the offer would have to state the exact
action required on the alleged offender’s part if he or she wishes to contest the alleged offence. It should also make it clear that inactivity will lead to the fine becoming enforceable without further reference to him or her.

11.23 We noted that the Stewart Committee considered the issues arising in systems involving opting into or out of a fixed penalty scheme and recommended the opting in process, in other words offenders are given the opportunity to opt in to the scheme by paying a fiscal fine or fixed penalty. If they do not they may be prosecuted. In line with our general proposition that the criminal justice system is entitled to assume a degree of acquiescence, a majority of us consider that the approach recommended by the Stewart Committee and later adopted should be changed from opting in to opting out. Accordingly we propose that an offender who is offered a fiscal fine or compensation or a fixed penalty notice should be required actively to opt out of the scheme in order to contest the charge in court.

11.24 Underlying the approach of the Stewart Committee was their concern about the “concept of deeming guilt by silence”. We agree that it is important to try to ensure that every alleged offender is made aware of the offer at the time but we all agree that that will not always prove to be possible. In most cases FPNs will be issued to the offender on the spot and so the issue will not arise. However, fiscal fine offers are normally issued after the initial contact between the offender and the police. The same would apply if fiscal compensation were to be introduced. For an opt out system to work well there should, so far as practicable, be evidence of delivery to the person to whom it is made either at his or her home address or at his or her place of work and it should be signed for. If the police are in contact with the accused at the time of, or after the commission of, the offence they should make clear to the accused that any address he or she provides them with will be used for the service of any documents (such as FPN notices). We recommend that the service of such documents should be carried out by the use of the recorded delivery postal service and not by police officers in the first instance. However, we also take the view that if there is no response in reaction to the recorded delivery postal service there should be at least a single further effort to serve an FPN or an offer of a fiscal fine or compensation on the alleged offender in person before treating the FPN or fiscal fine or compensation as a registered fine for the purposes of enforcement.

45 paras. 3.19-3.29.
46 para. 3.29.
11.25 We recognise that there are some practical difficulties with the approach which the majority of us recommend, as when, for example, the alleged offender is illiterate, is of no fixed abode, is absent from home for a prolonged period or there are other difficulties in effecting service. We regard the provision of a mechanism to prevent injustice in circumstances such as these as essential.

11.26 The first stage of a safeguard mechanism should, we suggest, be an application to the issuing agency (e.g. police or procurator fiscal) or to the enforcement agency (see chapter 32) after it has been passed for enforcement, requesting that the fiscal fine, FPN or other penalty is recalled or its terms altered. If it was apparent to the relevant agency that the penalty had been wrongly issued the action taken thus far should be recalled. If the applicant was able to demonstrate that he or she had not received the offer or penalty and wished to pay without the surcharge which had been levied, it should be possible to recall any surcharge and allow the time to pay which would have been allowed if it had been received in the usual way. If the applicant wished to contest the matter in court and had sufficient reason to have delayed expressing a desire to do so, the action taken thus far should be recalled and the usual procedure should be applied to a sanction of that kind when contested. In such circumstances it would be necessary to make provision for the interruption of the 6-month period within which proceedings for statutory offences must be commenced so that the period between the date of offer of the fiscal fine, FPN or other penalty and the date of its recall is not taken into account in calculating that period. We consider that it would be necessary in the interests of consistency to provide guidance to the issuing and enforcement agencies as to the circumstances in which applications for recall should be granted. We also consider that it would be necessary for there to be an appeal to a single judge of the summary court against a refusal by the relevant agency of an application to recall.

11.27 We are aware that the provision of such a safeguard may open the way to those who choose to ignore FPNs and fiscal fines in the hope that they will not be pursued. The experience of courts in parts of Australia where a similar approach is followed suggests that there can be difficulty separating genuine applicants from the less deserving. However if there were to be an administration fee payable with the application, which was returnable in the event of the application being granted, and if courts were to take a robust view of cases contested by this mechanism without good reason, groundless applications would be likely to be deterred. We also take the view that, in the same way that many do not actively contest fiscal fines and FPNs at present, they will be similarly unlikely to make
active use of the safeguard mechanism unless they have a genuine case. We believe that a simple mechanism that enables apparent injustices to be righted without recourse to expensive and time-consuming procedures is consistent with the approach we take to summary justice throughout this report, and in particular our proposals at paragraph 25.18 for correcting mistakes and injustices in the summary courts.

11.28 A minority of the Committee take the view that it is not right to impose a penalty unless there is the clearest evidence that the offender knows about the procedure (as with a police fixed penalty which is delivered personally). The vagaries of the postal system, and the difficulties of achieving face to face personal service, suggest to them that the opt-in procedure recommended by the Stewart Committee is the only appropriate one, i.e. if the offender does not accept the offer sent to him or her within the specified period, he or she should not be required to take any action and that, if he or she takes no action, the matter should be considered for prosecution. Accordingly they consider that there should be no change to the present arrangements in relation to the enforcement of fiscal fines.

11.29 However, the majority of the Committee take the view that, with a safeguard mechanism along the lines described above in place, an opt out system, i.e. choosing to be prosecuted as set out earlier in this chapter, is the best approach and should now be adopted. Its advantages appear to them to significantly outweigh the disadvantages which could arise in a small minority of cases. Any injustice which arose in those cases could be swiftly and cheaply corrected by the operation of the safeguard mechanism. Overall we see this change as an efficient and useful way of dealing with the comparatively low level offences with which these forms of disposal deal. Accordingly the majority strongly recommend that such a system should be introduced.

Potential Impact of the Opt Out Approach

11.30 Figures quoted earlier (see paragraph 7.38) suggest that a substantial minority (up to 30%) of district court cases are prosecutions where a fiscal fine offer has not been accepted. If enforcement is made more robust, so that those offered a fiscal fine have to opt specifically to have the case tested in court, we expect that prosecutions in this category will decline significantly. The calculation in paragraph 7.45 suggests a potential reduction of up to 10,000 prosecutions.
Extension to Other Fixed Penalty Notices

11.31 We note that the opting out approach which the majority of us recommend has been adopted in the Anti-social Behaviour Bill currently before the Scottish Parliament in relation to fixed penalty notices. The majority strongly support this approach for FPNs and would recommend that it is applied to any extension of the scope of FPNs in Scotland.

11.32 The scheme of FPNs may be capable of application by enforcement agencies other than the police in suitable situations, for example by local authority officers in relation to offences involving dog fouling.

11.33 We recognise that these arrangements cannot apply to FPNs issued under the road traffic provisions, even where the offender is detected at the time, as the procedures are governed by United Kingdom legislation. We recommend though that consideration be given to adjusting the United Kingdom arrangements in accordance with the procedures we propose.

11.34 The Committee is also very conscious that taking forward this option, while it will relieve a good deal of pressure on both the police and the procurator fiscal, will require implementation in parallel of a more cost effective and robust system of fines enforcement. This is dealt with below in chapter 32. Without that improvement, this proposal will merely shift work from the procurator fiscal to the fine enforcement system. So – as in many areas – our proposals need to be considered as an overall package.
Alternatives to Prosecution

We recommend that alternatives to prosecution should be made more widely available, more flexible and more robust, to enable the courts to focus on more rapid handling of serious crimes and offences while giving police and procurators fiscal the range of powers they need to respond quickly and appropriately to minor offences.

We recommend that non-acceptance of a fiscal fine offer may be disclosed to a court in connection with any prosecution for the offence alleged, and also that acceptance of an offer may be disclosed to any court in connection with any other current or subsequent proceedings commencing within a period of not less than 2 and not more than 5 years.

We recommend that information relating to fiscal fines accepted should be available to the police and procurator fiscal so that their consideration of the action to be taken when someone re-offends can be taken in the light of all the facts.

We recommend that, if fiscal fines are to be used more widely difficulties relating to enforcing their payment should be addressed.

We recommend that the calculation of time bar should be suspended for the period between the offer of a fiscal fine and notification as to whether the offer has been accepted or not.

We recommend that, as with FPNs, it should be necessary for the person to whom an offer of a fiscal fine is issued to take positive action if he or she wishes to contest the allegation. In other words, to opt-out of the fixed penalty scheme or fiscal fine or compensation offer, he or she should be required to complete and return a form indicating that the fine is to be contested.

We recommend that, as with FPNs, if the offender chooses to do nothing, the fiscal fine offer will become registered as a fine on the lapse of a fixed period.

We recommend that, as with FPNs, all unpaid fiscal fines which are registered should be subject to a 50% increase.

We recommend that a safeguard mechanism should be introduced to avoid injustice in relation to FPNs, fiscal fines and fiscal compensation orders where, for example, they have been wrongly issued or the person to whom one was issued was unaware of it having been issued and wished to contest it in court or to contend that no surcharge should be added for non-payment within the prescribed time.
Fiscal Fine Levels

11.35 On the assumption that changes on the lines above are implemented to make fiscal fines more robust, the Committee considered carefully the potential for increasing the use of fiscal fines. It looked at the level of court fines imposed by the summary courts, noting that these are relatively modest. In 2001 the average fine imposed in the sheriff summary court as a main penalty was £277. In the district court the average fine imposed by justices of the peace was £98; it was £190 in the stipendiary magistrate’s court.

11.36 The table below shows the number and range of fines imposed by each level of court in 2001:

<table>
<thead>
<tr>
<th>Number:</th>
<th>District Court</th>
<th>Stipendiary Court</th>
<th>Sheriff Summary</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£100-£199</td>
<td>11,652 (35%)</td>
<td>1,370 (43%)</td>
<td>11,517 (29%)</td>
<td>24,539 (33%)</td>
</tr>
<tr>
<td>£200-£299</td>
<td>2,310 (7%)</td>
<td>1,120 (35%)</td>
<td>10,675 (27%)</td>
<td>14,105 (18%)</td>
</tr>
<tr>
<td>&gt;£300</td>
<td>663 (2%)</td>
<td>425 (13%)</td>
<td>13,230 (34%)</td>
<td>14,318 (19%)</td>
</tr>
<tr>
<td>Average fine (£)</td>
<td>98</td>
<td>190</td>
<td>277</td>
<td>195</td>
</tr>
</tbody>
</table>

Source: SEJD Court Proceedings database 2001

11.37 As noted in paragraph 11.30, the opt out approach could significantly reduce the number of failed fiscal fines coming to court. The Committee considered carefully the additional reduction in court cases likely to be achieved by an increase in the value of the fiscal fine (see paragraph 7.41). The table at paragraph 11.36 appears to suggest that a doubling of the fiscal fine to £200 could potentially impact on around 24,500 cases currently prosecuted each year in the summary courts because of the number of fines of between £100 and £200 currently imposed in those courts. The actual impact from that increase (rather than from the tightening up of enforcement) is likely to be lower, both because up to 30% of district court prosecutions are related to failed fiscal fines (so it is important to avoid double counting of impact) and because the statistics tell you nothing about the record or status of offenders being fined. Many will have a recent relevant criminal record or a track record of rejecting or failing to pay fiscal fines which may have made them unsuitable for a fiscal fine offer. Nonetheless, it seems not unreasonable to assume that around half of the cases currently prosecuted in the first instance and fined between £100 and £200 might be suitable for diversion.
11.38 The Committee recognises the number of likely constraints on the potential effectiveness of an increase in the level of fiscal fines. In particular there is concern on the part of the courts, procurators fiscal, police and the community generally that certain types of offence should be prosecuted in the courts. It was apparent to the Committee from court visits and from discussions with procurators fiscal that they are more reluctant to use fiscal fines for more serious offences and particularly for more serious common law crimes. There are also some practical issues: although a police report always informs the procurator fiscal as to whether the alleged offender is working/on benefit, some procurators fiscal feel that this does not give them enough information about the financial circumstances of the offender and therefore the appropriate level of fine: again this is a sharper issue if the fine is higher. The use of fiscal fines also builds in an unavoidable element of delay in that the accused are given 28 days to decide whether to accept. Although our proposal above would streamline the process thereafter, some feel that extending the use of fiscal fines might conflict with the general effort to reduce delay.

11.39 Finally, the non-acceptance rate of fiscal fines is fairly high. As the table at para 11.18 above shows, in 2002-3 34,697 fiscal fines were offered and 17,648 accepted – a non-acceptance rate of almost exactly 50%. This non-acceptance rate might increase at a higher level of fiscal fines and if higher sums were offered than at present for particular offences. But the numbers of those who opt for prosecution would be likely to be markedly lower than 50% of those who are offered fiscal fines because that percentage includes those whose only reaction to the offer was inertia.

11.40 Nonetheless, the Committee invites the Executive to consider two options. Increasing the scope of fiscal fines from £100 to £200 would, we believe, have an impact on court business, though we consider that it would need to be accompanied by the structural changes in fiscal fines proposed above. It is in accordance with our proposals for a graduated system of alternatives to prosecution that procurators fiscal should have the power to offer fines at a higher level than police FPNs. We have noted (at paragraph 9.4) that a police fixed penalty notice can now be issued for £200 for using a motor vehicle without insurance. We would expect the maximum amount of a fiscal fine should be not less and preferably more than that. A higher level of fiscal fine would enable fiscals to offer higher levels of fine where the offence had particular features or where the offender had previously received an offer of a fiscal fine.
11.41 The Executive might want to take a more radical approach, increasing the potential limit of a fiscal fine to £500, in the clear recognition that the upper reaches of this would be relatively infrequently used and probably mainly for only for certain road traffic offences and for businesses which committed strict liability regulatory offences. The level of fiscal fine levied on a business might reasonably be higher than the level imposed upon an individual. Fiscal fines for businesses which offend have considerable attractions. They offer a speedy and simple way of dealing with regulatory infringements which is highly likely to be acceptable to businesses who wish to avoid the acquisition of a criminal record, while ensuring that infringements are penalised and those penalties recorded against any future infringement. Fiscal fines at the higher level could help to meet COSLA’s concern that offences within local authorities’ regulatory regimes should be effectively dealt with by the justice system. Those instances apart, the Committee does not envisage widespread use of fiscal fines at this level, and notes that procurators fiscal will often have insufficient information as to the means of an individual. But it believes that the upper limit would be best set at a level which allows considerable flexibility to procurators fiscal, rather than at a level of £200 which may turn out to be too low for some types of case. Many regulatory offences in which local authorities have an interest, such as non-compliance with planning conditions, for example, might be dealt with in this way. In the Netherlands the prosecutor has the power to impose penalties similar in nature to a fiscal fine, subject to a maximum of €450,000 (approximately £300,000).

11.42 We also note in connection with the present level of fiscal fines that there is a “double discount” element. This arises because offenders who are offered a fiscal fine benefit both from avoiding a prosecution (and a criminal record) and from a fine which is usually significantly lower than would have been imposed in the courts. We see no reason for this to continue. We do not suggest that fiscal fines should be equal to or greater than court fines as we do not wish to create a disincentive for them to be accepted when offered. However there would appear to be scope to bring fiscal fines up to a level closer to that of court fines without a significant disincentive to their acceptance. The avoidance of prosecution and a criminal record would continue to be a strong incentive for many offenders, although it is accepted that this element is of limited value to offenders who already have a criminal record.
We recommend that the Executive considers increasing the scope of fiscal fines from £100 to either £200 or £500 - increasing the range of cases in which they could be used and bringing fiscal fine levels closer to that of court fines.

Fiscal Compensation Orders

11.43 Guidance issued to procurators fiscal on the use of fiscal fines states that a fiscal fine should not be offered if it is thought that compensation should form all or part of the appropriate court disposal. The Committee therefore considered whether there was potential, in the interests of reducing the number of cases appearing before courts, to propose the introduction of a compensation order to be fixed by the procurator fiscal in the same way as a fiscal fine.

11.44 In 2001, compensation orders were imposed in 4% of cases proved in the sheriff summary courts, 7% in the district court and 1% in the stipendiary magistrates court, with average values of £310, £116 and £162 respectively. The table below shows the categories of cases where a compensation order was imposed, either as the main penalty in court or in addition to some other main penalty.
The Summary Justice Review Committee

Number of persons with a charge proved in summary courts, by main crime or offence and whether compensation order imposed as a main or secondary penalty, 2001

<table>
<thead>
<tr>
<th>Main crime or offence</th>
<th>Compensation order imposed as a main penalty</th>
<th>Compensation order imposed as an additional penalty</th>
<th>Total where compensation order imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
<td>Number</td>
</tr>
<tr>
<td>All crimes and offences</td>
<td>1,128</td>
<td>4,725</td>
<td>5,853</td>
</tr>
<tr>
<td>All crimes</td>
<td>733</td>
<td>2,838</td>
<td>3,571</td>
</tr>
<tr>
<td>Non-sexual crimes of violence</td>
<td>24</td>
<td>74</td>
<td>98</td>
</tr>
<tr>
<td>Crimes of indecency</td>
<td>2</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Crimes of dishonesty</td>
<td>294</td>
<td>1,174</td>
<td>1,468</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>39</td>
<td>140</td>
<td>179</td>
</tr>
<tr>
<td>Theft by opening lockfast places</td>
<td>43</td>
<td>136</td>
<td>179</td>
</tr>
<tr>
<td>Theft of motor vehicle</td>
<td>12</td>
<td>51</td>
<td>63</td>
</tr>
<tr>
<td>Shoplifting</td>
<td>33</td>
<td>214</td>
<td>247</td>
</tr>
<tr>
<td>Other theft</td>
<td>95</td>
<td>381</td>
<td>476</td>
</tr>
<tr>
<td>Fraud</td>
<td>41</td>
<td>176</td>
<td>217</td>
</tr>
<tr>
<td>Other</td>
<td>31</td>
<td>76</td>
<td>107</td>
</tr>
<tr>
<td>Fire-raising, vandalism, etc.</td>
<td>409</td>
<td>1,545</td>
<td>409</td>
</tr>
<tr>
<td>Other crimes</td>
<td>4</td>
<td>41</td>
<td>45</td>
</tr>
<tr>
<td>All offences</td>
<td>395</td>
<td>1,887</td>
<td>2,282</td>
</tr>
<tr>
<td>Miscellaneous offences</td>
<td>378</td>
<td>1,233</td>
<td>1,611</td>
</tr>
<tr>
<td>Simple assault</td>
<td>250</td>
<td>856</td>
<td>1,106</td>
</tr>
<tr>
<td>Breach of the peace</td>
<td>50</td>
<td>195</td>
<td>245</td>
</tr>
<tr>
<td>Other</td>
<td>78</td>
<td>182</td>
<td>260</td>
</tr>
<tr>
<td>Motor vehicle offences</td>
<td>17</td>
<td>654</td>
<td>671</td>
</tr>
</tbody>
</table>

Source – SEJ D Court Proceedings database 2001

11.45 The Committee also looked at the types of offences for which a fiscal compensation order might be appropriate, provided that the offence in question was the most serious or “main” offence faced by the accused:
11.46 From these figures it appears that there are just over 1,000 summary cases per year where the main penalty is a compensation order. Many of these will be suitable for fiscal compensation orders, though the Committee recognises that some prosecutions will not just be because of the unavailability of a fiscal compensation order, but also because it was a repeat offence, or was considered too serious.

11.47 Secondly, there are around 5,000 cases where a compensation order is additional to the main sentence and it might well be that a large number of these could be dealt with by way of a combination of a fiscal fine and fiscal compensation order. Most of these will involve a fine as the main sentence. In about 12% of cases in which compensation is ordered as a secondary penalty the main penalty is a community service order or a probation order.

11.48 Finally, there are around 15,000 cases of simple assault, shoplifting, vandalism and other property offences which are dealt with by way of a fine, where prima facie an alternative financial penalty, i.e. a compensation order, might have been appropriate but for the traditional reluctance of the courts to use this latter option (for example compensation was awarded in only 44% of all vandalism cases). It should be noted that there will be considerable overlap between the 5,000 cases in the second category and the 15,000 or so in the third category.

11.49 Vandalism and shoplifting offences might be particularly appropriate for fiscal compensation orders. We did note during the course of consultations on this proposal that among the generally very strong support, there was a commonly held view that fiscal compensation would not be appropriate for physical injuries. Within the Committee there were those who supported this view, while others took the view that this was an issue that could be dealt with through the use of appropriate and sensitive guidelines.
11.50 Nonetheless, it is possible that a significant proportion of these cases could have been dealt with by way of a compensation order, rather than a court fine. On the assumption that at least 50% of the cases in which a compensation order forms a main or ancillary penalty could be dealt with through a fiscal compensation order (with or without a fiscal fine in addition), and that a significant proportion of certain other minor offences currently dealt with by prosecution and fine could be so dealt with, we estimate that between 5,000 and 10,000 cases could be diverted.

11.51 It is considered that in addition to the possibility of reducing the number of cases appearing in court, a fiscal compensation order might offer benefits in that it could lead to increased levels of payment as offenders recognise the value of directly compensating victims rather than making fine payments to the state. Similar considerations could also lead to witnesses being readier to indicate their willingness to come forward.

11.52 A key issue here is the circumstances in which compensation may be ordered. At present compensation orders can only be made by a court, and Section 249 of the Criminal Procedure (Scotland) Act 1995 empowers the court to make a compensation order where a person has been convicted of an offence requiring that person to pay compensation “for any personal injury, loss or damage caused, whether directly or indirectly by the acts which constituted the offence”.

11.53 Section 250 of the Criminal Procedure (Scotland) Act 1995 requires a court to prefer a compensation order where both a compensation order and fine might be appropriate in respect of an offence, but the offender is thought to have insufficient means to pay both. We recommend that a similar approach should be taken by procurators fiscal to fiscal fines and fiscal compensation orders.

11.54 In recommending the extension of power to make compensation orders to procurators fiscal, we would also support an extension of the circumstances in which they may be made by both the court and the procurator fiscal. Both should be able to make a compensation order where the victim of offending behaviour has been subjected to behaviour which is frightening, distressing or annoying or has caused nuisance or anxiety. The test would require to be largely objective, i.e. whether the behaviour would have that effect on a reasonable person. It might also include recognition of the fact that certain individuals – such as those suffering from a physical or mental disability – are more likely to be intimidated or seriously concerned. Much of the conduct which is caused by anti-social
Alternatives to Prosecution

neighbours or youths in a neighbourhood falls within what we have in mind, and we consider that these proposals would complement those within the Anti-Social Behaviour Bill. Such moves would be consistent with present efforts to make the criminal justice system more victim-focused.

11.55 Where such offences are at the lower end of the spectrum, we therefore recommend that a procurator fiscal should be able, in conjunction with or separate from a fiscal fine, to impose a compensation order on an alleged offender. The means of enforcement should be the same as those for fiscal fines.

11.56 In this context we recognise that there will be difficulties for procurators fiscal in assessing the level of compensation where there is not a readily quantifiable loss, as when a broken window requires to be replaced at a particular cost. To achieve consistency clear guidance to procurators fiscal will be important. In this context the Executive may wish to consider examples such as that of the Netherlands, where there is a computer software programme enabling prosecutors to identify characteristics present or absent in any particular case. The computer “calculates” on the basis of all the information an appropriate sum to offer both for a fine and for compensation. Such a system is particularly valuable where compensation is not readily quantifiable as it can be when it is for the cost of repair. It has been introduced with a view to securing consistency in decision making across the Netherlands. In the interests of transparency and public confidence in the system we would recommend that guidelines on the amounts and applicability of fiscal compensation orders are publicly available. (We are aware that COPFS are giving consideration to the publication of some guidelines in relation to fiscal fines, but that there are concerns that this information should not be of use to offenders in planning criminal acts. We recognise that concern, but welcome moves to greater transparency.)

11.57 Most of us believe that so far as fiscal compensation orders are concerned there should be no prescribed upper limit. If the offender is prepared to pay compensation in full for the criminal act which caused loss, and provided that the sum is paid, we consider there may be no reason to justify a prosecution in addition. There are criminal acts which are themselves relatively minor, but which cause substantial loss. The plate glass window of a shop may cost £1,000 to replace. Its damage may have been incidental to a breach of the peace rather than the consequence of a deliberate attempt to break it. The payment in full of compensation may markedly exceed the amount of any fine which is likely to be imposed by a court. We consider that the system should be sufficiently flexible to allow compensation to be paid and the issue to be resolved in this manner, rather
than to bring about a situation where prosecution is thought necessary solely because of the amount of loss that was caused. If, of course, the size of the loss reflected a serious offence, a fiscal compensation order would not be appropriate.

We recommend that a procurator fiscal should be able, in conjunction with or separate from a fiscal fine, to impose a compensation order on an alleged offender. We recommend that in parallel with s250 of the 1995 Act, the procurator fiscal should prefer a compensation order where an offender’s means appear to be insufficient to pay both a fiscal fine and a fiscal compensation order.

Guidelines on the use of compensation orders should be produced. The guidelines should, as far as possible, be publicly available.

We recommend that both the courts and the procurator fiscal should be given power to make a compensation order where the victim of offending behaviour has been subjected to behaviour which is frightening, distressing, annoying or has caused nuisance or anxiety.

We recommend that fiscal compensation orders should have no prescribed upper limit.

We recommend that the arrangements for enforcement of fiscal compensation orders should be the same as for fiscal fines/FPNs.

Other Diversion from Prosecution Schemes

11.58 Information from 2002-3 shows that 2173 cases were referred to diversion schemes, of which 1,744 cases were accepted by the schemes concerned. Schemes are generally run by the Criminal Justice Social Work Departments of local authorities, often in partnership with voluntary organisations. Health Boards are also occasionally involved. Schemes seek to provide support which focuses on offenders with particular social or mental problems, such as drug or alcohol addiction or mental health issues. In addition, there are a limited number of mediation and reparation schemes run by SACRO providing full restorative justice. Although there are schemes in each of the areas currently covered by the social work groupings, coverage varies between localities.
11.59 It appears that schemes are limited by the number of places available, rather than by the number of suitable clients and it might be that the increase in the availability of places on such schemes could reduce the number of court prosecutions. The Committee was, however, very aware of the 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.

11.60 In discussing the further use of diversion schemes, the Committee noted that there was little evaluation available of the costs and benefits of the schemes. Although those schemes the Committee examined appeared to work well and were supported by procurators fiscal and social workers, the Committee considered that recommendations on their relative efficacy as a diversion measure was on the margin of their remit. It did not feel that it had enough information firmly to recommend their wider use. It did, however, consider that more should be done to evaluate the costs and benefits of diversion schemes as compared to other types of disposals. The Committee was concerned that good schemes should, where possible, be available nationally. Consistency of provision across the country would ensure that offenders could be dealt with similarly no matter where they live, which is not the situation at present.

We received very positive feedback from sentencers, procurators fiscal and social workers about the value of diversion schemes and recommend that effective schemes be made available nationally. We note, however, that little has been done to evaluate the costs and benefits of diversion schemes compared with other types of disposals.

We recommend that steps should be taken to ensure that, where a scheme has proved to be successful, it is available consistently across the country.
Chapter 12

BETTER COMMUNICATION BETWEEN PROCURATORS FISCAL AND POLICE AT AN EARLY STAGE

12.1 If a decision is going to be taken eventually that there should not be a prosecution in a particular case, where possible that decision should be taken as soon as possible after the alleged offender has been charged. In Scotland the two functions of police and prosecution are substantially separate. There is not currently a strong culture of close co-operation between COPFS and the police during the early stages of less serious cases, though there is in serious cases; in less serious cases there may be no process overlap. We consider that it would be of benefit if they came closer together and if their processes overlapped more frequently, at least to the extent of more frequent discussion. It is more an end to end arrangement at present. The Committee thinks that there should be better communication and closer co-operation between COPFS and the police in relation to less serious cases so as to avoid unproductive or unnecessary work being carried out by the police and to reduce the numbers of reports submitted to procurators fiscal by the police of cases which are not likely to result in a prosecution.

12.2 The police report cases to the procurator fiscal, as they are required by statute to do. But procurators fiscal mark quite large numbers of cases reported to them, particularly in some areas, as “no proceedings”. The range is from 25% of reported cases to 6%, with a total of 51,343 marked “no proceedings” out of 310,968 cases reported in 2002-3. Other cases reported to the procurator fiscal by the police may result in the offer of a fixed penalty by a procurator fiscal, a written warning by the procurator fiscal or a fiscal fine. Yet other cases may be diverted to other alternatives to prosecution. If a case is not to be prosecuted, either because it is regarded as too trivial, because there is never likely to be enough evidence to prove the charge or because the offender will be offered one of these alternatives to prosecution, that decision should be taken at the earliest possible stage and should, where possible, be taken in time to avoid the need to prepare a full police report. If it is, a substantial proportion of the significant amount of police time currently required to prepare a full report, much or all of the time required to check that report and the time required by the procurator fiscal to consider that report will be saved. Where a report, especially a full report, has been prepared by the police in most such cases, more work will have been done by the police than was really necessary. It is a waste of police time and resources to prepare full reports of cases which are likely to be marked “no proceedings”, for example.
12.3 While we believe that it is for COPFS on the one hand and the police on the other to work out the best ways of co-operating with each other in order to save time and effort, we recommend that consideration be given to evaluating the costs and benefits of different arrangements for closer co-operation with a view to increasing early decision taking – ranging from co-location of procurators fiscal in police offices (perhaps part-time in some larger offices), through access to a duty procurator fiscal by the police by e-mail and telephone, to regular meetings between procurators fiscal and police (not just at senior level) for discussion of particular problems which have arisen, together with the development of (probably local) guidelines, e.g. as to when not to report particular offences, when warnings should be issued by the police and when abbreviated reports should be submitted.

12.4 Even in the context of clear local guidance from procurators fiscal to police as to how different cases should be handled there will always be cases on the borderline in relation to which a quick early discussion between the police and the procurator fiscal could save a good deal of later work for both. Protocols which cover most cases need to be complemented by better communication about more difficult cases. Rather than the police completing a report and then passing to the procurator fiscal information which may be in excess of what is required – or indeed fall short of what is required – it would be beneficial for there to be more scope for discussion at an early stage.

12.5 We consider that this culture change would have wider benefits. Procurators fiscal often commented to us about the quality of reports and other information they receive from the police. They saw the solution to that particular problem as better training for the police. While we would agree that better training would be likely to have a beneficial effect, we consider that better communication with a procurator fiscal would be much more likely to give police officers a clear idea of what procurators fiscal needed. So the benefit would go wider than the individual case under discussion.

12.6 As a minimum we believe that there should be local arrangements whereby the police can contact a duty procurator fiscal – preferably by phone though possibly by e-mail – for advice and receive a response within an agreed target time. Similarly, the police need to be so structured so that, when a procurator fiscal seeks further information about a report to inform the prosecution decision, it is clear how the police will handle the question and the time frame within which the procurator fiscal can expect an answer.
12.7 The Committee also considered physical co-location of police and procurators fiscal as a route to better communication. This is not uncommon in other jurisdictions, and is being introduced as a matter of policy in England and Wales following the Glidewell Report. 47

12.8 The Committee also recognised, however, that the policy rationale for the changes south of border reflect a different position to that in Scotland. One of the key reasons for co-location in England is to improve case preparation and help to eliminate the problem of the reduction by the Crown Prosecution Service of charges preferred by the police in the light of the evidence, causing widespread disillusion to victims. The Glidewell changes were partly intended to begin the process of shifting responsibility for charging from police to the Crown Prosecution Service – and the Committee noted with interest that England has taken a further significant step in that direction, enabling charging by the prosecutor in terms of Section 29 of the Criminal Justice Act 2003. In Scotland the procurator fiscal, not the police, determines what charges should be brought. There are many other differences between England and Wales on the one hand and Scotland on the other, not least in the extent to which use is currently made of IT to transmit information between the police and the prosecution, that use being currently much greater in Scotland.

12.9 In Scotland better communication is required not because the roles of police and procurators fiscal are changing, but it is required to speed up case handling in general and, in particular, given the extension of alternatives to prosecution envisaged by this report, to support the more sophisticated and much earlier decision making required.

12.10 In this context physical co-location is recognised to be less essential than what one might call electronic co-location – being able to get in touch readily and informally with a clear contact in the other organisation.

12.11 Nonetheless, there may be circumstances in which physical co-location would be useful, and the Committee looked at the two obvious options – location of a procurator fiscal in a police station, and location of a police officer in a procurator fiscal’s office.

12.12 Given the differences in scale of operation, locating a fiscal in a police station, even part time, will only be practicable in limited circumstances. If a fiscal were to be located in each sub-divisional office covered by the fiscal service in Glasgow this would occupy 15 out of a total of 87 or so legally qualified staff, or a multiple of that number if procurators fiscal were required outwith normal office hours. But in the busiest police stations a part-time procurator fiscal might be able to look at the evidence in cases presented, take a decision there and then as to whether no further proceedings will be taken, whether alternatives to prosecution will be appropriate or whether prosecution should go ahead. The procurator fiscal could also consider some of these reports in draft where the police have doubts as to whether the information provided will be adequate to meet requirements of the procurator fiscal in taking a decision on how to proceed.

12.13 In the setting up of any such arrangements, care would need to be taken so to define them as to avoid potential problems which COPFS identified to us. They were concerned that such an arrangement would encourage the police to pass on their decision taking function to the procurator fiscal more generally, and that the procurator fiscal would be under pressure to adopt a prosecution policy of which police in that police station would approve. They might, for example, come under pressure to reduce or eliminate the number of cases which would be marked no further proceedings.

12.14 While both police and procurators fiscal guard their independence fiercely, we recognise any co-location would have to be designed as to avoid these difficulties.

12.15 Co-location in the other direction – putting police officers in procurator fiscals’ offices – was more generally supported where it would be cost effective. The proposal is not new: there used to be police officers attached to some fiscal offices but many have been withdrawn. There is co-location in the Dumfries and Galloway Constabulary area. The police officer would act as a liaison officer between the procurators fiscal in that office and individual police officers at all levels. It is easier for a police officer to find his or her way round police systems and track down the information required. Our consultation suggested that a liaison police officer might well offer considerable advantages in terms of efficiency and effectiveness over the current process of the procurator fiscal tapping in to the police system through a variety of routes.

12.16 This arrangement would probably not be cost effective in small fiscal offices but might well justify the costs involved in larger offices. The Committee
has not had the opportunity to conduct a cost/benefit exercise to demonstrate what size of office would justify such co-location, and the best way forward may be to pilot the idea and evaluate the outcome. Support for this idea came from many police officers and procurators fiscal, including at senior levels and we recommend that the Executive should seek a local area or areas willing to pilot this approach and to test how well it works in practice.

We recommend that the police and COPFS should put in place arrangements for better communication and closer co-operation between them in relation to less serious cases.

We recommend that the police and COPFS try out various different local arrangements for improved informal communication, to enable decisions to be taken as early as possible on whether and how a case should be taken forward and to improve standards of case preparation. An example of such an arrangement would be the location of a procurator fiscal in a main police station.

We recommend that the Executive should pilot the co-location of police officers in COPFS offices.
Chapter 13

UNDERTAKINGS TO APPEAR IN COURT

13.1 Summary criminal cases first call in court either when the accused appears from custody, usually on the first court day after arrest, in answer to a citation served on the accused along with a copy complaint or in compliance with an undertaking given by the accused when released by the police to appear at court at a particular time. The great majority of cases at present commence with the citation of the accused.

13.2 As we have explained elsewhere (see para 2.29) there is often a long delay between the date of the offence and the date when the case first calls in court following citation of the accused. We consider that one of the key components to ensure the effective despatch of summary business is a reduction in the time taken to get an accused into court. In this context we were keen to explore the potential for a significant expansion of the bail undertaking scheme. This scheme is currently used to fast track certain cases, often drunk driving cases in sheriff courts. In these cases the accused is usually released from a police station having been charged and after having given an undertaking to attend court on a certain date. The complaint is served on the accused when he or she appears in court on the specified date as a complaint would be on an accused who appears from custody. The use of undertakings clearly allows for cases to be brought to court significantly faster than cases commenced by citation.

13.3 The present distribution between cases appearing from custody, or on undertakings, etc. is illustrated by the following data based on cases closed with a summary court disposal between July–September 2003).

Sheriff court cases

- 57% Cited;
- 11% Undertakings;
- 24% Custodies;
- 6% Warrants;
- 2% Reduction to Summary/Other.
District court cases*

- 89% Cited;
- 2% Undertakings;
- 7% Custodies;
- 1% Warrants.

*excluding stipendiary magistrates’ court in Glasgow

13.4 The scheme we envisage is that, in the great majority of cases in which a summary prosecution is likely, at the police station the accused would sign an undertaking to appear at a particular court on a particular date and at a particular time. It would, of course, be for the procurator fiscal to formulate any charge against the individual, but the undertaking form should describe the offending behaviour being reported to the procurator fiscal in sufficient detail for him or her to obtain legal advice in advance of the date on which he or she is due to appear in court. The police would have electronic access to the availability of slots in the court programme within the following three to four weeks. We envisage that local arrangements would be put in place to limit the number of cases which would call in court at a specific time. The police would not require to have access to the whole court diary. Nor would the court need to be given the names of those who had given an undertaking. All that would be required is that the court would allocate a number of slots at a particular time in the week. Once these slots had been used up the police would be shown the next available time on a computer screen.

13.5 In any expansion of the undertaking scheme we accept there should always be discretion allowed to the Crown to determine how cases should ultimately proceed. We envisage that the procurator fiscal would retain the option of determining that there should be an alternative disposal such as diversion or fiscal fine/compensation order, or to change the court district in which a case would be heard, once the report of the case was received from the police. We note that the introduction of a unified summary court, with all-professional judges (all having the same jurisdiction), would remove the need for the procurator fiscal to specify in which particular level of court a case should be prosecuted. All cases calling in court following an undertaking would be allocated by the court to a sheriff or a summary sheriff. The police would not take the place of the procurator fiscal who currently determines whether the case should call before the district court or the sheriff court (or in Glasgow district court whether the case calls before a stipendiary magistrate or a lay justice).
13.6 In this scheme where the police become, in effect, the gatekeepers of the summary court system it is worth reiterating the point we make elsewhere (see chapter 12) on the need further to develop close working relationships between procurators fiscal and the police.

13.7 Options open to the procurator fiscal when an accused is released on an undertaking to appear in court would be:

- proceed in the usual way with a summary prosecution following service of the complaint on the accused at court; the case could be dealt with that day if there was a plea of guilty; or
- move for the case to be continued on the strength of the undertaking without a complaint being served for further investigation or for consideration of diversion or offer of fiscal fine;
- intimate before the case calls to the accused that the case would not call and arrange for a form of diversion; or
- intimate in advance to the accused that the case would not call and offer a fiscal fine;
- intimate in advance that there would be no proceedings.

13.8 Turning to the types of case that might be dealt with by bail undertakings, in the most serious cases, accused are detained in custody pending their appearance in court. We recognise that it would be unrealistic to say that all other cases should be prosecuted by means of an undertaking.

13.9 Police officers whom we have consulted pointed out that at present many accused are dealt with on the spot rather than at a police station, and there would be some difficulty at present providing an accused with a date for a court appearance. Undertakings would be more easily issued at the police station rather than on the street - there would be a controlled environment, it would be supervised, there would be the opportunity for fingerprinting and taking DNA samples and the ability to use a computer to generate the necessary documentation.

13.10 We are, however, aware that in other jurisdictions, such as New South Wales, the police are able to use a similar procedure to deal with offenders on the spot. This procedure is called a Field Court Attendance Notice. As the name implies, these are forms which can be used to issue what would be an undertaking in Scotland. Field Court Attendance Notices contain details of the defendant, the police officers involved and the offence(s). The notice directs the
defendant to appear in a particular court at a specified time and advises him or her to obtain legal advice immediately. It goes on to state: “On your first date of appearance at court, you should be in a position to advise the court, if required, of whether you wish to plead guilty or not guilty to the alleged offence.” It advises the defendant what to do if he or she requires an interpreter and concludes by stating: “Failure to appear may result in your arrest or in the matter being dealt with in your absence.”

13.11 We do not suggest that an equivalent procedure, involving release on undertakings away from a police station, should be the first stage here, although we do recommend that thought be given as to how it could be developed.

13.12 The Lord Advocate has issued guidance to Chief Constables relating to liberation by the police. This includes guidance on the use of undertakings to be used in situations in which detention in custody of the accused is not merited, but where it is appropriate to fast-track the accused’s appearance before court. In general terms, at present, cases are identified as suitable for undertaking on the basis of characteristics of the offender or victim more than on the nature of the individual crime charged. Examples of where an undertaking might be used are: where the accused is on bail, probation or the like, but the offence for which he or she has been apprehended is of a minor nature and there is no other reason to detain the accused in custody; or where the involvement of child victims makes it preferable to bring the case to court without delay. There is scope for making local arrangements for specific categories of offence, and it is the norm, for example, for drink/driving or football-related offences to be dealt with by undertaking. We consider that release on an undertaking should become standard practice in relation to those alleged to have committed offences covered by the guidelines who are taken to a police station and who are not detained in custody. This might be achieved by extended guidelines issued by the Lord Advocate, at least during a transitional period, while there continues to be a backlog of cases in the system.

13.13 As the next stage we recommend that all cases which are dealt with in police stations other than by detention in custody should use the undertaking procedure to arrange the first appearance in court. We would hope that, as the procedure beds in and technology and practice develops, it would eventually be possible to issue undertakings notices irrespective of whether the defendant was dealt with at the police station or on the spot. This would require developments in practice, such as the police having remote access to court sitting dates – but would potentially reduce the delay between detection and first appearance in court very substantially.
13.14 We have consulted widely on this aspect of our proposals, and although on the face of it they would require a greater effort on the part of the police and COPFS (at least early on in the proceedings, but with savings later) we have been encouraged by the generally very positive response. The police to whom we spoke supported increasing the use of undertakings in an effort to reduce the time taken to bring offenders to court but thought that the introduction of an expanded scheme would have to be incremental – there would be a backlog of cases already programmed into the system which would have to be dealt with in addition to those cases in the future appearing in court more quickly. They recognised that although expanding the use of undertakings would place new pressures on the police and procurators fiscal, if it was part of a package to speed up the system and reduce time spent dealing with minor offences, it was a process management challenge which the police would meet. Consultation with procurators fiscal also indicated they thought there was scope for expansion of the undertaking scheme, with the proviso that there was enough time for the prosecution and the defence to prepare for the first calling of the case in court. The same number of cases would still have to be marked, but at an earlier stage.

13.15 We are aware of changes introduced in England and Wales following the Narey Report, and in particular the streaming of cases to Early Administrative Hearings and Early First Hearings. There is a statutory requirement for a person arrested and released on bail to appear first in court at the next available magistrates’ courts slot. In practice this has meant that cases are being heard a matter of days after the offence was committed. We take the view that there is a danger that the defence and prosecution would not be adequately prepared if cases were brought to court after such a short period in Scotland, and we understand that in England and Wales there has been some similar concern that cases are appearing in court before they are ready to do so. We do not think that the extension of the undertaking scheme that we are proposing would produce similar difficulties. We consider that undertaking cases should call in court within 3-4 weeks of the undertaking being given. Over time it may be possible to reduce that period particularly if, as we recommend, the numbers of cases which are dealt with by prosecution diminish and are dealt with more expeditiously once they reach court, e.g. by increased pleas of guilty at earlier stages.
We recommend that in the great majority of cases in which a summary prosecution is likely, the accused, if not detained in custody, should sign an undertaking to appear at a particular court on a particular date, and at a particular time. We recommend that this be introduced in phases.

We recommend that the first phase should include, as a broad category, cases to be identified by Lord Advocate’s guidelines, with a second phase encompassing all cases dealt with in police stations.

We recommend that, as a third phase, consideration should be given to the introduction of a system of undertakings completed by police officers elsewhere than at a police station.

We recommend that police officers be given access to slots in court diaries within the next 3-4 weeks to allow them to fix times suitable to the court for accused persons to appear on an undertaking.

We recommend that where an accused has been released on an undertaking procurators fiscal should retain the option of determining that there should be an alternative disposal, such as diversion or fiscal fine, or no proceedings and, if so, should be able to cancel the requirement to appear.

We recommend that it should be possible for the case to be continued for further investigation or for consideration of diversion or offer of fiscal fine on the strength of the undertaking without a complaint being served.
Chapter 14

ENCOURAGING EARLY PLEAS

14.1 According to data held by the Scottish Court Service, in the sheriff courts some 25% of cases that are called to trial plead guilty on the day of the trial. In some courts the percentage is much higher. We do not have equivalent data for the district courts, but have no reason to believe that the percentage so doing would be significantly less. We share the view widely held by those who work within the system that this represents an unacceptable waste of court resources and inconvenience to witnesses and victims. To put this in perspective, 25% of trials means that in something like 16,000 sheriff court cases every year trials are scheduled in busy court diaries where the accused pleads guilty on the day. Assuming an average of about four witnesses per case, around 64,000 people are needlessly called to court. Of these a significant proportion will be police officers.

14.2 We believe that it is possible and practicable to reform the summary criminal justice system so as to increase significantly the percentage of cases which plead guilty without a trial being fixed, or if a trial is fixed, the percentage of cases which plead guilty before the date of the trial. We think that there are four main elements which need to be in place to encourage an accused person who intends to plead guilty to do so at an early stage in proceedings. These elements are:

- that the defence solicitor should have sufficient information made available to allow him or her to advise the accused of the strength of the case against him or her at an early stage;
- that defence solicitors should be properly remunerated for work done at an early stage of a case;
- that there should be an incentive in terms of likely sentence to encourage an early plea; and
- that the accused should have good reason to expect that a trial will go ahead on the appointed day.

14.3 We deal with each of these issues in more detail below. We are of course aware that the system can only do so much to encourage an early plea. There will always be those accused who will wish to put off the day of reckoning to the last moment, particularly if a custodial sentence is a possibility, and there will be those who will hope that something will turn up, for example a witness will not attend. However, if only a partial improvement in the numbers who delay a guilty plea
until the last moment can be achieved there is the potential for significant benefits for court resources and witnesses.

**Ensuring the Defence has Sufficient Early Information**

14.4 One of the principal causes of delay is the relatively late stage in the process at which the defence have sufficient information to reach a conclusion as to what the plea should be. If the accused were to receive a copy of an abbreviated police report or a summary of the evidence with the complaint he or she would be provided with a clear indication of the strength of the case at the earliest possible stage. Solicitors told us that at present they are not in a good position to give advice to their clients when the complaint is served. They see the copy of the complaint served on their client but they are dependent on what their client tells them about the events which led to the charge(s). They have no other source of information at that stage which would enable them to challenge what they are told. Solicitors would welcome an opportunity to be able to give realistic advice to their clients at that stage. In most cases at present solicitors feel obliged to advise clients who do not express a clear wish to plead guilty, or whose account is or may not be consistent with such a plea, to plead not guilty.

14.5 We were told by procurators fiscal and police officers that they would not see any great difficulty in the provision of such a summary, as all of the information would be available in the police report. We are conscious of the need to avoid further form-filling exercises for the police or fiscal and so would envisage that the police report could be adapted so that a discrete part summarising the evidence could be copied or detached and passed to the accused with the complaint. The summary of the evidence served with the complaint might, for example, show that the charge was based on or included the evidence of eye witnesses who could identify the accused, CCTV footage or an admission. If at that stage accused are made aware that they have been seen committing the offence, when they thought they had not been, their willingness to plead guilty would be likely to increase. Such an arrangement appears to be working effectively in the youth court pilot.

We recommend that the prosecution should make available to the defence solicitor sufficient information to allow the latter to advise the accused of the strength of the case against him or her at an early stage of the process. Where the accused is unrepresented the material should be passed directly to him or her.
We recommend that a summary of the evidence is provided to the accused along with the copy of the complaint.

Ensuring Defence Solicitors are Properly Remunerated for Initial Work on a Case.

14.6 The legal aid system, so far as it relates to summary criminal cases, appears to us to contribute to delayed guilty pleas by placing a premium on pleading not guilty. Very briefly, there are two main types of legal aid for those prosecuted in the summary courts in Scotland. One is the Advice By Way Of Representation (ABWOR) scheme which can provide for representation for accused in cited cases who wish to plead guilty. ABWOR covers the diet at which the plea of guilty is tendered and any subsequent diet. (ABWOR is also applicable in other circumstances such as pleas of competency that challenge the legality of proceedings and for breaches of probation or community service.) To grant ABWOR, a solicitor must be satisfied either that “it is likely that the court will impose a sentence that would deprive the applicant of his or her liberty or lead to a loss of his or her livelihood”, or that the “applicant is unable to understand the proceedings or is unable to make his or her own plea in mitigation because of age, disability etc”. Generally the solicitor receives £70 for all work up to and including the first diet. If a subsequent diet is set, the solicitor may continue to provide help up to a limit of £150. Further assistance under this scheme requires authorisation from the Scottish Legal Aid Board (SLAB).

14.7 The Summary Legal Aid scheme which is intended to be the main scheme applying to proceedings in the summary courts is only available after the accused has entered a not guilty plea. There is a means test (that, after consideration of the financial circumstances of the accused person, the expenses of the case cannot be met without undue hardship to him or her, or his or her dependants) and a merits test (that it is in the interests of justice for legal aid to be granted). Following the introduction of fixed payments in 1998, the sums payable under the scheme are £300 plus VAT for appearances in the district court and £500 plus VAT in the sheriff court. This payment is intended to cover all the solicitor’s work up to the first 30 minutes of a trial or proof in mitigation. Further payments are available if the case goes beyond 30 minutes and for other matters such as deferred sentences and bail appeals. The payment covers the cost of taking precognitions.
14.8 There are two other schemes which are less relevant to our consideration here: these are the Advice and Assistance scheme, which provides support for a range of circumstances where an individual might require legal advice, but not for court appearances; and the Duty Solicitor scheme, which provides for solicitors to be present in courts dealing with initial appearances of accused from custody. If the accused pleads not guilty he or she is then eligible for the Summary Legal Aid scheme. If there is a guilty plea, the solicitor can be paid for subsequent work up to a value of £108.

14.9 The significant difference between the remuneration under the two main schemes mentioned above might be seen as an incentive for solicitors to advise clients to plead not guilty. We do not intend any criticism of solicitors on this point. We are confident that most solicitors faced with a situation where a client is clearly guilty would advise that client to plead guilty. In many situations, however, the position is not clear cut. For example, certain investigations may be required to allow proper advice to be given. Again, the client may admit to some aspects of the complaint, while denying other aspects. In these situations the solicitor would require to advise the client to plead not guilty as there is no other way in which the solicitor can be remunerated while the circumstances of the case are investigated more thoroughly to enable proper advice to be given as to the plea which should be tendered. When a person pleads not guilty, the court is required to fix a trial diet and an earlier intermediate diet. That will usually have the effect that the ultimate disposal of the case is prolonged.

14.10 We do not think that our remit extends to attempting to re-design the legal aid system. We recognise that there are inherent difficulties in designing a system so that solicitors are adequately remunerated for initial work on a case, without at the same time opening the door to increased legal aid claims for cases which would have pled guilty under the present arrangements. Nevertheless we take the view that if an accused is eligible for legal aid, the system should make it possible for his or her solicitor to obtain reasonable remuneration for carrying out such initial investigation as may be necessary to tender a plea of guilty and to deal with that plea in court at an early stage. In any future system it is important that there should be no incentive to investigate cases to an unnecessary extent nor to prolong those cases which are not going to go to trial. Effort and legal aid funds should be concentrated on those cases which merit full investigation.

14.11 In this context we also note the Public Defence Solicitors’ Office (PDSO). This scheme involves solicitors employed by SLAB, albeit with complete operational independence, undertaking the defence of clients alongside private
sector firms. The scheme started with a pilot project in Edinburgh, but is now to be extended to Glasgow and Inverness. Formal research was done at an early stage in the life of the project, and we were told that the per-case costs of the PDSO were comparable to those of private firms and conviction rates were also broadly similar. However, PDSO cases generally had a shorter trajectory with fewer hearings, and were concluded earlier in the prosecution process. This would seem to us to indicate that there is scope for a re-design of the legal aid scheme to encourage the earlier resolution of cases before trial. We have discussed this proposal with the Scottish Legal Aid Board and believe that a successful re-design is feasible. We have already mentioned (see paragraph 7.97) that moving to an all professional bench would have implications for the legal aid system. It would seem sensible that this issue should be addressed at the same time as any restructuring of legal aid to encourage the earlier resolution of cases before trial.

We recommend that defence solicitors should be properly remunerated for work done at an early stage of a case and be able to obtain reasonable remuneration for work for legally aided clients pleading guilty at this stage.

We recommend that the summary criminal legal aid scheme should be amended to remove the current incentive to plead not guilty, to encourage the early resolution of cases and to discourage the maintenance of pleas of not guilty until relatively late in the proceedings in cases which the trial is not likely to proceed.

14.12 We received many representations at various stages to the effect that there should be a more robust system of discounting of sentences for early pleas of guilty in summary cases, that such a system should be applied consistently over Scotland as a whole and that it should be transparent, in the sense that the court is required to deal expressly with the issue when it arises and make it clear what discount is being given for such a plea and why, or why no discount has been allowed. We take the view that a clear and well understood system of discounts is likely to result in early pleas in a significant proportion of cases which currently plead at or shortly before the trial. Discounts provide an incentive to the guilty to plead guilty at an early stage. We are clear that a transparent system of sentence discounting for early pleas of guilty has an important part to play in making our summary justice system more summary. That implies that discounts should be consistently given, that in appropriate cases the discounts given should be significant and that the system of discounting should be made widely known to those charged in the summary criminal courts.
14.13 The current provision for sentence discounts is set out in section 196(1) of the 1995 Act, which provides that:

“(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court may take into account –
(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
(b) the circumstances in which that indication was given”.

14.14 The terms of that subsection gave rise to widespread uncertainty as to whether or not it is competent to discount to a different type of sentence when an early plea is tendered. It was suggested to us that any revised provision for sentence discounting should make it clear that such a course is competent. In the opinion of the court in Du Plooy v HMA, delivered by the Lord Justice General on 3 October 2003, (2003 SCCR 640) the court stated at para. 3:

“A number of points may be noted about section 196(1). First, the subsection indicates that the taking into account of the matters mentioned in paragraphs (a) and (b) may have a bearing, according to the circumstances of the case, not only on the extent of a sentence but also on the type of disposal or order which is made”.

Later in the opinion at para 27 the court reiterated that: “the matters mentioned in paragraphs (a) and (b) of section 196(1) may have a bearing not only on the extent of a sentence but also on the type of disposal or order which is made.”

14.15 It is clear from these passages that, in the opinion of the court, a sentencer has power in summary cases to select a sentence which takes account of all the relevant factors, including those relevant to a discount, and may impose a different type of sentence from that which would have been imposed had there been no discount. In the light of the decision in that case we do not consider that any change of the kind suggested to us is required.

14.16 However, the court went on to say at para. 5 that:

“it is to be noted that section 196(1) sets out matters which a court ‘may’ take into account. In the corresponding enactment in England the wording is identical apart from the use of the word ‘shall’ (section 152(1) of the
Powers of Criminal Courts (Sentencing) Act 2000, formerly section 48(1) of the Criminal Justice and Public Order Act 1994). None of the parties to the discussion in this court was able to give a convincing explanation why ‘may’, rather than ‘shall’, was used. One might expect that the sentencer should take these matters into account: they are neutrally expressed. What allowance, if any, the sentencer makes in respect of them is another matter. It may be little or none at all. In the end of the day the parties submitted that there was no practical difference between section 196(1) and the corresponding English provision. In accordance with existing practice in Scotland the sentencer is expected to explain why an allowance was not given where there was an early plea of guilty (Cleishman v Carnegie 1999 GWD 36-1764)."

14.17 Our view is that, at least so far as summary cases are concerned, section 196(1) of the 1995 Act should be amended by changing “may” to “shall”. We note that clause 17 of the Criminal Procedure (Amendment) (Scotland) Bill would make this change and would also amend section 196 by providing that in passing sentence the court would be required to state whether, having taken account of the matters referred to in sub-section 1(a) and (b), the sentence imposed is different from the sentence which the court would otherwise have imposed and, if it is not, why it is not. In relation to summary cases it is our view that that provision does not go as far as it should.

14.18 What allowance is given once the matters referred to in sub-section 1(a) and (b) have been taken into account is, as the court said, a separate matter. If a discount is to be given, we consider that it is important not only that the discount be stated in open court but that, in summary cases, the extent of the discount which has been given, together with a brief statement of the reasons for it being given should be minuted, as should the fact that no discount has been given. We think that that should be a legislative requirement. In busy criminal courts, in which many summary cases may be dealt with in a day, the discounts given or not given should not be left to the later recollection of those present in court. The requirement to minute the extent of the discount and the reasons for it would lead to greater clarity. Those present in court should be told what discount has been given and why. Similarly we take the view that where no discount has been given, the court should also be required to state and to minute that fact and the reasons for it. That approach derives support from the opinion of the court in Du Plooy and Others at para 25 where the court stated:
“In our view it is desirable that, where a plea of guilty and related matters call for some allowance, the sentencer should use a distinct discount in the process of arriving at the appropriate sentence, and should state in court the extent to which he or she has discounted the sentence. The sentencer can do so in a number of ways, such as by indicating what the latter would have been, or by stating the measure of the discount. We appreciate that in Scotland there is no statutory provision corresponding to section 152(2) of the Powers of Criminal Courts (Sentencing) Act 2000, which requires a sentencer in England to state in court, if it is the case, that the punishment is less severe than it would otherwise have been. However, it is in the interests of the public as well as that of the accused that the extent to which sentences are discounted should be known. Those who represent accused persons should know, at least in general terms, the extent to which a sentence is likely to be reduced in the event of an early plea of guilty, so that they can advise the accused accordingly. Stating the discount which has been applied will also serve the purpose of providing victims and the public with a clear explanation as to how the sentences on a plea of guilty have been arrived at. In indicating that this practice should be adopted, we do not mean to suggest that, as from this time, there should necessarily be a reduction in sentences, but rather that there should be greater transparency in the process by which sentencers explain what has led them to the sentences which they impose.”

14.19 So far as the extent of the discount which should be allowed is concerned the court at para 26 stated:

“Since the significance of the timing and circumstances of the tendering of the plea of guilty, the practical consequences of the plea and any related matters will vary, it would not be appropriate for there to be a fixed or ‘normal’ discount. What should be the discount in the individual case is plainly a matter for the discretion of the sentencer. For the same reason we do not consider it appropriate to indicate a maximum or a minimum discount. However, we consider that the discount should normally not exceed a third of the sentence which would otherwise have been imposed. In any particular case, the discount may well be less than that proportion, or none at all. There may, on the other hand, be exceptional circumstances which would justify a greater discount.”
14.20 This gives sentencers helpful guidance on the issues they should take into account. We have considered English and Australian cases and practice and recognise the scope for the introduction of a more prescriptive regime as to the extent of the discount which should be allowed in particular circumstances. We consider that any such regime should evolve once courts have greater experience of discounts.

14.21 What matters is that there should be a consistent practice of giving a significant and, where merited, a substantial discount for early pleas, with greater discounts being given in the early stages of cases. We would expect that solicitors would routinely advise their clients of the availability of discounts. In its examination of consistency in sentencing practice more generally the Sentencing Commission may wish to consider the emerging pattern of sentence discounting and whether it is consistent across the country. At Plea and Directions Hearings in Crown Courts in England and Wales (in accordance with practice rules issued by the Lord Chief Justice) and at pre-trial review hearings in magistrates’ courts counsel or the defence solicitor are asked if he or she has advised the accused of the availability of a sentence discount for a plea of guilty at that stage. A pro forma question which is used in a magistrates’ court is in the following terms: “Is the defendant aware that credit will be given for a timely plea of guilty (and may be lost if the plea is delayed)?”. We recommend that at intermediate diets the court should routinely obtain confirmation that such advice has been given. (See chapter 20 on intermediate diets generally.)

We recommend that there should be an incentive in terms of a probable sentence discount to encourage early pleas of guilty.

We recommend that in the generality of cases a court should not allow any discount of sentence for a plea on the day of the trial or during the trial.

We recommend that, as far as summary cases are concerned, section 196(1) of the 1995 Act, which enables sentencers to take into account the stage at which a guilty plea is tendered in considering the award of a sentence discount, should be amended by changing “may” to “shall”.

We recommend that sentencers be required to state in court whether they have given a sentence discount and the amount of that discount and that the court should be required to minute that.
We recommend that where a sentencer does not give a discount, that fact should also be stated in court along with the reasons for allowing no discount and that the court should be required to minute that.

We do not recommend at this stage that there should be a prescriptive scheme with detailed guidance as to levels of discount.
Chapter 15

ELECTRONIC COMPLAINTS

15.1 Section 138 of the 1995 Act requires the complaint to be signed by the procurator fiscal. Other documents required in the course of summary prosecutions also require personal signatures, such as citations and warrants. Hitherto the requirement for a personal signature has not been perceived to have disadvantages provided that the documents concerned are signed as required. We see no reason however why courts should not take full advantage of modern electronic storage and transmission. Nor do we see why, provided the technical issues are satisfactorily dealt with, the formality of a person’s signature, which is a form of authentication, should not be replaced by electronic authentication. We are aware that work is being undertaken on the electronic authentication of documents in a wide range of applications involving official documents and where security is a primary consideration. We note that in this context that the Electronic Communications Act 2002 would require Scottish Ministers to satisfy themselves that an electronic system is no less satisfactory than the system it replaces. We recommend that these developments are applied where possible to documents used in summary courts.

15.2 To make best use of electronic facilities we recommend that the principal copy of the complaint, minutes and the like should be the electronic version (which, in the case of the complaint, would have been authenticated by the Crown in whatever manner may be determined prior to the complaint leaving the procurator fiscal’s office on the ISCJIS system). Any hard copy of the complaint whether or not it included amendments to the charge(s) made during the course of a prosecution (of which there would be an electronic record) should be regarded as a copy, not as the principal complaint. Where cases are transferred from one court to another, the court to which the transfer is made should be regarded as holding the principals on its electronic database. Any copies of complaints, minutes etc. which are printed out should to be regarded as copies for the Crown, the accused or for use by the court. These copies should not require authentication or further authentication in the form of a signature by the procurator fiscal. If authentication of documents already stored electronically is required once a case has called in court it should be by an authorised officer of SCS, such as the clerk of court. That authentication, if required, would certify that it is a true copy of the electronic version.
15.3 Where cases are transferred from one court to another it should not be necessary to complete the physical transfer of hard copy documents before the receiving court can start dealing with the case. Physical transfer would no doubt take place in due course but we do not believe that the delays which could be involved in such a transfer need to be a feature of the system. So that the system can be seen to work fairly it may be necessary to provide that the accused or his or her solicitor may inspect online at the court the complaint and minutes relating to that case as of right. In time it ought to be possible to provide online access to such documents for solicitors and counsel at their office or chambers.

We recommend that the principal copy of the complaint, minutes and the like should be the electronic version, on the assumption that technical and security issues can be satisfactorily resolved.

We recommend that copies of complaints, minutes, etc. which are printed out should be regarded as copies for use by the court, the accused or the Crown.

We recommend that an accused or his or her solicitor should be able to inspect the electronic originals of such documents as of right.
16.1 Persistent offenders, many of them under 21, may have multiple summary prosecutions outstanding at any one time. It is not uncommon for there to be 10 or more current cases involving the same person. These cases are often outstanding in one or more court districts and in both sheriff and district courts.

16.2 Where there are several outstanding cases in the same court, that court will usually attempt to get all the cases before the court on the same day, particularly for the purpose of imposing sentence. To get all the cases to call together on the same day will, in practice, usually involve multiple adjournments of some of the cases.

16.3 If there are other outstanding cases in another court or courts it is often argued that cases should be adjourned to await the outcome of at least one of the cases in another court. It may be said that another case is the most serious of the outstanding cases. If the offender is to be imprisoned or sentenced to detention by another court, there would be no point in imposing a different sentence, such as probation, in any of the cases before the present court.

16.4 This culture of multiple adjournments in multiple cases has several undesirable consequences and no advantages. Multiple adjournments add substantially to the delay in disposing of cases. They use up considerable resources, for the Crown, the defence and the courts, wholly unproductively, contributing substantially to the phenomenon of “churning”. They delay the sentencing of offenders who will usually be on bail and be able to commit other offences, something which these offenders often do, leading to yet more cases. The advent of a new case or cases can be used as an argument for further adjournments. We believe that this problem, which is very prevalent and an obvious defect in the present system, can and must be tackled.

16.5 At present pending cases cannot be transferred from one court to another nor between sheriff courts and district courts. Procurators fiscal can discontinue a prosecution in one court and include the same charges in a new complaint in another court but that adds to delay and causes additional expense. For these reasons that is not commonly done.
Rolling Up Outstanding Cases

16.6 With new information systems available to COPFS, procurators fiscal, when considering a report by the police, can discover which other cases that particular accused has outstanding and where they are. Courts should be able to access that information too. We believe that, so far as practicable, all outstanding cases involving the same offender should be prosecuted in the same court, and that a routine check should be made in all cases to ascertain whether there are other outstanding cases relating to that accused.

16.7 Normally it would be the task of the Crown to apply to have cases transferred to or from a particular court. However, we consider that the court should also have power to direct such transfers at its own hand. Before any such direction would be made the Crown and, if present, the defence would have to be heard. The test would be whether the transfer was in the interests of justice, bearing in mind the desirability of minimising delay and expense. There should be a presumption in favour of transfer.

Transfer Procedure

16.8 If a court was minded to direct a transfer there might have to be some discussion between procurators fiscal of the courts affected and between the courts themselves as to the practicalities of the transfer before a direction was made. Elsewhere (see chapter 15) we recommend that the principal copy of the complaint, minutes and the like should be the electronic version. Where cases are transferred from one court to another, the court to which the transfer is made should be regarded as holding the principals on its electronic database once the transfer is complete. But both courts should have such access as they may require to the case file. Any copies of complaints, minutes etc which are thereafter printed out should to be regarded as copies for use in that court. It should not be necessary to complete the physical transfer of hard copy documents before the receiving court can start dealing with the case.

Cases at Different Stages

16.9 We accept that multiple cases relating to a single offender may be at different stages when they call in court on the same occasion. Some may have been continued without plea. In others a trial may be pending. Where more than one trial is pending the court should be given power to direct that these trials
Dealing with Multiple Cases Against an Accused

should be heard together as if the charges on the complaints were charges on the same complaint. There will be occasions when this cannot or should not be done. Most charges of theft, assault, breach of the peace, road traffic offences and the like, though charged in more than one complaint should, in many instances, be capable of being tried fairly on a single occasion rather than individually. The fact that an offender has pleaded guilty to a number of charges and not guilty to other charges in a complaint should not preclude that complaint being rolled up in this way.

16.10 We consider that the court should have power, on Crown, defence or joint motion, to conjoin complaints and direct that they be treated as a single complaint for the purposes of trial. There would, in effect, be a single trial. There should be a presumption in favour of conjunction, except where a motion for the separation of charges would be likely to be granted under existing law.

16.11 For the purposes of sentence however each complaint should remain subject to its own maximum. The court should remain able to make sentences imposed on one complaint consecutive to sentences on any other complaint.

16.12 We do not believe that this proposal should cause any particular difficulty with criminal legal aid, or at least none which cannot be overcome. We acknowledge that on occasions different solicitors will have been acting for an accused in connection with different complaints in different courts when two or more cases have been brought together in the same court. If a number of complaints were to be conjoined into a single complaint, it would clearly be sensible and probably necessary for there to be a single defence agent.

16.13 We take the view that in most instances it would be better not to transfer cases where a trial has taken place but sentence has not yet been imposed. It might in many circumstances cause less delay if the court were to proceed to sentence irrespective of potential sentences in other courts. If a case was transferred after a trial and a finding of guilt, the court to which the case is transferred would find it helpful to have a brief summary of the facts established at the trial. We would expect the transferring court in those circumstances to provide a report in an electronic form (which might be attached to the minute transferring the case). The Crown would, in a few cases, have to invite the transferring court to cancel any outstanding warrants, for example, requiring witnesses to be brought before the transferring court.
16.14 In this context we note that a court may only take into account a conviction for an offence committed prior to the commission of the offence under consideration.\(^{48}\) An offender who has engaged in a course of criminal conduct over a period may plead guilty to some charges and not guilty to others, with the result that he or she may have convictions arising during that course of criminal conduct, some of which are for offences prior to and others are for offences subsequent to the offence then under consideration by the court. Convictions subsequent to the commencement of the current proceedings cannot be laid before the court even though the offences concerned predated the offences in the current complaint. The court when sentencing should be able to consider the whole of the offending behaviour without artificial restrictions of that kind. We recommend that the law is changed to enable all convictions to be taken into account at the time of sentencing irrespective of whether the offences were committed prior to or subsequent to the offence under consideration.

**Deciding Which Court Should Deal with the Cases**

16.15 If cases are to be transferred from one court to another, the court to which they should normally be transferred is the court of the area where the accused lives. In the event of conviction and community sentences being imposed it is preferable that the offender be dealt with in the area where community sentences will be carried out. We are of course aware that probation orders and community service orders can be transferred by the court which imposed them to the court district where the offender lives. But if it became competent for some but not all courts to impose, say, structured deferred sentences or probation orders with regular reviews, as is the case with drug courts and the Hamilton youth court pilot project, the court which makes orders of that sort should be the court in which the reviews will take place. The youth court has as its rationale that both the needs and the deeds of the offender will be addressed in the round. If the youth court pilot were to be rolled out to other parts of Scotland it would be more or less essential that only one court, normally the offender’s home court, took on that task. Having cases calling in other courts for sentence could lead to sentences of imprisonment or detention which may result in considerable effort and expense invested at another court, aimed at tackling the causes of that person’s criminal conduct, being frustrated and wasted. When an offender receives a sentence which is subject to continuing review it is important that any later criminal cases are dealt with in the court where the review requirement is operative. Much the same considerations already apply to drug courts.

\(^{48}\) Penman v HM Advocate, 1999 S.C.C.R 740.
Witness Considerations

16.16 We recognise that rolling up multiple cases to be heard in a single court could potentially mean longer journeys and more inconvenience for witnesses. However, our experience suggests that most offenders who commit offences do so for the most part within a relatively local area which may include more than one court district. It is relatively rare for an offender who lives in Glasgow, for example, to commit offences in Aberdeen. Where that occurs it may not be practicable to transfer a case.

We recommend that, where possible, all outstanding complaints against an accused should be dealt with in the same court, in most cases preferably the court in whose jurisdiction the accused lives.

We recommend that when there are cases outstanding against the same accused the Crown or the defence should be able to apply to have cases transferred to or from a particular court so as to bring the outstanding cases together in the same court.

We recommend that the court should have power to direct such transfers at its own hand, having heard the Crown and, if present, the defence.

We recommend that the court should have power, on Crown, defence or joint motion, to conjoin complaints and direct that they be treated as one for the purposes of trial.

We recommend that for the purposes of sentence each complaint be dealt with separately and should remain subject to its own maximum.

We recommend that the law be changed to enable all previous convictions to be taken into account irrespective of whether the offences were committed prior to or subsequent to the offence under consideration.

We recommend that where cases are transferred from one court to another the transfer should be carried out electronically; it should not be necessary to complete the physical transfer of hard copy documents before the receiving court can start dealing with the case.
Chapter 17

DISCLOSURE OF PREVIOUS CONVICTIONS PRIOR TO CONVICTION

17.1 Section 101(3) of the 1995 Act provides that: “Previous convictions shall not ... be laid before the presiding judge until the prosecutor moves for sentence, and in that event the prosecutor shall lay before the judge a copy of the notice” of previous convictions. There is an accepted exception to that rule where proof of the conviction is essential to prove the substantial charge. Driving while disqualified is the most common example. In terms of section 58 of the Civic Government (Scotland) Act 1982 a person who has two or more convictions for theft, which are not spent convictions, is guilty of an offence if he or she has or has recently had in his or her possession any tool or other object from the possession of which it may reasonably be inferred that he or she intended to commit or has committed theft and is unable to demonstrate satisfactorily that his or her possession of the tool or other object was not for the purposes of committing theft. Contraventions of the Firearms Act 1968, section 21 and prison-breaking are other examples of circumstances in which it will be necessary to prove a conviction on an earlier occasion to establish the commission of the crime or offence concerned.

17.2 One of the consequences in practice of the way in which section 101(3) is drafted is that, where an offender is charged with driving while disqualified and other motoring offences arising out of the same incident, such as dangerous or careless driving or drunk driving, the court will fix two summary trials and two intermediate diets. One of these will be restricted to driving while disqualified and having no insurance, which is an inevitable consequence of driving while disqualified. The other will deal with the other motoring offences, whatever they may be.

17.3 We can see no good reason why it should continue to be necessary to have two prosecutions arising out of one incident or out of events which took place on the same occasion. The court will often be aware that there are two complaints against the accused arising out of the same incident. These two complaints will progress together until the time of the trial. If both cases go to trial they will normally be heard by separate judges. Judges should normally sentence any accused whose trial they have taken. In fact the accused should be sentenced for all the offences which arise out of the same incident by one court. There is authority to the effect that a judge, in considering the guilt of the accused in relation to a particular offence, should be able to put the existence of any
previous conviction(s) out of his or her mind if it is appropriate to do so.\textsuperscript{49} The present arrangements, requiring two trials instead of one are unsatisfactory and should be changed. We have considered whether we should go further and recommend that section 101(3) should not apply to previous convictions, proof of which is essential to the proof of any charge on any complaint. This is a matter which may merit further consideration, particularly if courts are given power to conjoin complaints for the purposes of trial. We have restricted our recommendation to charges arising out of the same incident or on the same occasion, which appears to us to preserve the spirit of section 101(3).

\textbf{We recommend that section 101(3) of the 1995 Act should be amended in respect of summary cases to allow all charges arising out of the same incident or on the same occasion to be included on the same complaint and to go to trial at the same time, even though one or more of the charges discloses a previous conviction.}

\textsuperscript{49} Stirling v Herron 1976 SLT (Notes) 2.
Chapter 18

PRIORITISATION OF CASES

18.1 Priority is given currently to cases involving domestic violence, cases with a racialist dimension and cases involving children or vulnerable witnesses. The Committee was urged to recommend that these and other types of case, such as cases affecting community safety and those involving persistent offenders be given priority over others. A strong case was made by some for a specialised domestic violence court. We have also, on the other hand, been urged not to recommend the prioritisation of any type of case, on the basis that some other types of case will suffer by being accorded a low priority and would take much longer to deal with.

18.2 The main thrust of our recommendations is to speed up the summary justice system as a whole. If it were to function significantly more quickly than at present, the need for prioritisation of some types of case would diminish. The introduction of specialised courts, such as drug and youth courts, has the effect that cases calling in these courts have a priority of their own in terms of court time and in terms of resources from social work services. Prioritisation in practice means that slots have to be reserved in the court diary so that cases can be fitted in at short notice; but if the court diary is already full, cases with dates already fixed may have to make way for priority cases, i.e. some cases will have to be adjourned. For these reasons, whilst recognising that priority is currently accorded to a number of cases fulfilling certain criteria, we would urge caution in extending the types of case which should be accorded priority, with the possible exception of cases calling in a domestic violence court because of the risk that a delay in intervention may lead to the complainer sustaining further harm. We do not have any general recommendation to make as to the prioritisation of some types of case over others. We believe that prioritisation of types of case can best be achieved by decisions made by COPFS which is already operating to guidelines as to which cases should be given priority. The operation of these guidelines might usefully be monitored by local criminal justice boards.
We do not have any general recommendation to make as to the prioritisation of some types of case over others.

We recommend that prioritisation should remain the responsibility of COPFS.

We recommend that efforts to speed up the system as a whole should take precedence over prioritisation of some types of case and over the introduction of further specialised courts.
Chapter 19

CITING WITNESSES

19.1 Ensuring that witnesses are aware of their obligations to attend court - and that parties are clear about the attendance of their witnesses - is critical to effective trials.

19.2 In summary procedure witnesses are cited by the Crown after the initial pleading diet. Traditionally citation has been executed personally by police officers, but the Crown Office and Procurator Fiscal Service has been piloting a system of postal citation and return in relation to civilian witnesses in summary cases.

19.3 National roll out of postal citation in relation to summary cases commenced in September 2003. From that date all procurator fiscal offices have had the ability to cite witnesses through the post, and COPFS began to implement a joint protocol with the Scottish police and the Scottish Court Service to cite witnesses in summary cases according to agreed targets (see paragraph 19.8 below). Postal citation is not rigidly employed in relation to every witness in a summary case; personal citation is still used, for example, for child witnesses and for witnesses who will require an interpreter.

19.4 There has recently been considerable interest in witness citation at two levels - whether the current system is operating as efficiently as possible and, more radically, whether citation should no longer lie with either the Crown Office and Procurator Fiscal Service or the police, but instead with a single body created for that purpose and working under the management of one or the other.

19.5 Lord Bonomy’s review of the High Court examined the options in relation to solemn cases, and took the view that:

“Management of the citation process would be greatly improved if there existed a body with the sole responsibility of arranging the attendance of witnesses at court. Such a body would be answerable directly to the Crown, or might even be a branch of the Crown Office and Procurator Fiscal Service. They could develop systems which could be applied throughout the country. I would expect them to cite police officers and forensic scientists by sending citations to the relevant divisional police office and to police headquarters. They would deal direct with other professional
witnesses such as pathologists. Most importantly they would trace and cite civilian witnesses, report difficulties to the procurator fiscal and return citations timeously to the procurator fiscal.”

19.6 Despite this strong personal view, he concluded that he had not in the time available been able to investigate the options in sufficient depth to make a formal recommendation for a witness citation body under the control of the Crown. His report simply recommended that a working party be set up immediately to report urgently on a national system for the citation of witnesses and the appropriate body to undertake the task.

19.7 There has been a working party involving ACPOS and the Crown examining the issues on citation. It has, however, worked on the basis that every attempt should be made to create greater efficiency and certainty within the existing framework for citation, and particularly in the context of the roll out of postal citation, rather than moving directly to a radical restructuring of the system.

19.8 As already noted, the working party has agreed new protocols to be in operation from 1 September 2003. They provide that COPFS will issue postal citations and initiate personal citations within 7 days of the pleading diet. The police will serve the initial personal citations and return the written executions to the Crown no later than 10 working days before the Intermediate Diet. There will also be clear arrangements to ensure that where postal citation fails the police can serve personal citations and return executions to COPFS no later than 3 working days before the Intermediate Diet.

19.9 The Committee recognised the significance of those protocols, which represent the first clear targets set jointly by and for COPFS and the police in this area. The targets are intended to allow the police more time to serve citations and to allow COPFS to be better prepared for intermediate diets (and first diets in cases which proceed by way of solemn procedure). Adequate evaluation and monitoring arrangements should be put in place to establish how effectively the new protocols are working, and to identify what further changes to the system may be required.

19.10 Whilst noting these positive developments, we recommend that detailed consideration be given by COPFS, in liaison with the police, to establishing a national centralised system (though not necessarily a national agency) for the citation and countermanding of witnesses, making best use of IT. Lessons will no doubt be learned as the protocol beds in, and these will inform the decision on a centralised system.
19.11 Further consideration needs to be given in a case which has reached the stage of trial. If not all the witnesses appear, the court has to decide whether to part-hear the trial or to adjourn it. Often if there are more cases going to trial than can realistically be dealt with that day, the court at a relatively early stage in the day will be tempted to accede to a motion by the procurator fiscal or the defence or both to adjourn the trial, unless the trial has been adjourned at least once before. The court will adjourn the case to a new date which will often be several weeks later. Witnesses have to be re-cited for the adjourned date.

19.12 We recommend that, when an adjourned trial date is to be fixed, before the witnesses who are present leave the court that day, they should be cited for the adjourned date. That procedure would have the added advantage that many witnesses will be able to say there and then whether or not they will be available for the proposed adjourned date. Then the only witnesses for whom formal citation to an adjourned trial would be necessary are those who did not answer their citation. In cases in which civilian witnesses are countermanded in advance of a trial in which it is known that there will be an adjournment, it is worth considering whether information could be gathered at the time of countermanding as to their availability for likely adjourned dates.

19.13 We also recommend that the competent means of citation be extended to allow citation by e-mail. We accept that there would require to be an acknowledgement of receipt of an e-mail citing the witness to attend court at a particular time, in order to meet the requirement of section 141 of the 1995 Act, i.e. to establish that the person concerned was duly cited. For this reason we have not proposed the use of other means of contacting witnesses for the purpose of citation, as we do not see how a satisfactory proof of receipt could be obtained. However, our view is that the purpose of citation is to inform the witness when he or she is required to attend court and simple means of conveying the necessary information should be used where possible in the future, provided that the citation can be verified later. A witness could be contacted by telephone and informed of the need to attend. If the witness attended no difficulty would arise. But it is not likely to be possible to prove citation by that means, unless the conversation was recorded.

19.14 Other measures require to be taken to make sure that potential witnesses can more easily be contacted with a view to informing them of the progress of cases and countermanding them when the cases are not to proceed. We believe that the police have an important role to play in improving the ability of the system to contact witnesses. At the point of first contact between a police officer and a potential witness (or an accused) we believe that information should
routinely be collected on a number of different ways in which that person might be contacted. We would expect the police to obtain the home and work address, the home, work and mobile telephone numbers and home and work e-mail addresses of the person concerned so far as that person has such means of contact. We note that ACPOS have suggested this might be a reasonable task for the police and that a national database of witness details could be established which could be accessed by both COPFS and the police (and by any new citation agency, were one to be created).

19.15 We believe it may be necessary to provide in legislation that failure to comply with a reasonable request by a police officer for such information should be an offence, punishable by a modest penalty. And there would have to be clear protocols for the deletion of witness details from any national data base once the case is concluded. This could be done simultaneously with the provision of similar information to SCRO.

19.16 The process of citation and countermanding witnesses can leave witnesses uncertain whether they will be required, particularly if their case has already been adjourned at least once. It is worth considering whether more convenient arrangements could be made for witnesses and victims to be kept up to date about the progress of cases in which they are involved, e.g. by enabling them to get access to a database to check whether their case will be going ahead on the date and at the time fixed for it. In jury trials it is not uncommon for arrangements to be made for prospective jurors to phone out-of-hours to hear a message telling them when they will be required.

We recommend that the operation of the new protocols for ACPOS/Crown handling of witness citation should be carefully monitored to establish whether they deliver timely and efficient witness citation.

We recommend that detailed consideration be given by COPFS, in liaison with the police, to establishing a national centralised system (though not necessarily a national agency) for the citation and countermanding of witnesses, making best use of IT.

We recommend that when a trial is adjourned witnesses present at the trial should be re-cited for the adjourned trial before they leave the court, leaving only those who did not attend to be re-cited formally by post or in person.
We recommend that the police routinely obtain the home and work address, the home, work and mobile telephone numbers and home and work e-mail addresses of either accused or witnesses so far as that person has such means of contact, for the purpose of providing information and countermanding witnesses.

We recommend that, provided a satisfactory system of proof of receipt is put in place, it should be competent to cite a witness by e-mail, where an e-mail address has been provided.

We recommend that legislation should provide that failure to comply with a reasonable request by a police officer for citation details should become an offence.
Chapter 20

INTERMEDIATE DIETS

20.1 When an accused pleads not guilty to a charge or charges on a summary complaint the court will fix a diet of trial. It will also fix an intermediate diet, commonly for a date 14-28 days before the date for the trial. Intermediate diets were introduced in April 1996 because it was found that on the day fixed for the trial a large number of trials did not go ahead. This usually happened because of one or more of the following occurred:

- the accused did not appear;
- there was a plea of guilty;
- the procurator fiscal was prepared to accept a reduced plea;
- some witnesses had not been successfully cited or had failed to answer citations;
- the defence was not properly prepared;
- the court had set down too many trials for that day in which pleas of not guilty were adhered to, with the result that not all of them could be heard that day.

20.2 The intention was that the intermediate diet would sort out most of these difficulties in advance of the trial so that witnesses did not needlessly attend on the day of the trial in cases which would not be going ahead. In theory the intermediate diet should have resolved all or most of these problems in the great majority of cases.

20.3 In terms of section 148(1) of the Criminal Procedure (Scotland) Act 1995 the purpose of an intermediate diet is to ascertain:

“So far as is reasonably practicable, whether the case is likely to proceed to trial on the date assigned as the trial diet and, in particular - the state of preparation of the prosecutor and of the accused with respect to their cases; whether the accused intends to adhere to the plea of not guilty, and the extent to which the prosecutor and the accused have complied with the duty under section 257(1) of this Act.”
Current Use of Intermediate Diets

20.4 It is apparent from figures which we have seen that the success of intermediate diets varies very considerably from one court to another. Effectiveness, as measured by the number of intermediate diets that dispose of the case without the need for any further diet, and without an apprehension warrant being issued, ranges from 16% to 43%, with the average being 25%. (This does not of course measure how effective intermediate diets are at securing agreement of evidence and reducing the numbers of witnesses required.) In some courts they are regarded as a considerable success in achieving their objectives. In others they are regarded as a complete waste of court time and resources, with few cases being disposed of at that stage but many pleas of guilty on the day of the trial. These attitudes are reflected in the figures. In many courts unrealistically large numbers of intermediate diets are set for a morning or afternoon, which precludes any possibility that they will involve a useful examination of the readiness of a case. It was represented to us that it is unlikely that a court will deal as effectively as it might with intermediate diets if more than about 30 cases are fixed for the same time in the court diary, e.g. for 10 a.m., 12 noon or 2 p.m. In many courts the numbers fixed are much higher than that.

20.5 Sometimes the defence have not even received a list of the Crown witnesses prior to the intermediate diet. We were told that in at least one large urban court the Crown sometimes does not know at the intermediate diet which witnesses it intends to call. In many courts the Crown may be unaware whether or not citation of any of the witnesses required for a trial within the next 2 to 4 weeks has been effected successfully. On other occasions some citations may have been returned but others not.

20.6 We were often told that the defence have found it impossible to get hold of a procurator fiscal to discuss a case prior to an intermediate diet and even more difficult to speak to a procurator fiscal who has any knowledge of the case. Procurators fiscal told us that they often had difficulty contacting defence solicitors, attempting to return calls. These complaints more often came from those who practise in large courts than small, where the level of co-operation and communication is generally good. But the level of co-operation to be found, for example, in Aberdeen Sheriff Court and in Aberdeen District Court appears to enable intermediate diets to work much better in these relatively large courts than they do in some others of comparable size. The hopes for intermediate diets have been largely fulfilled in some courts, but hardly at all in some others.
20.7 Intermediate diets have not been as effective as they should have been in reducing the numbers of witnesses who are required to attend court to give oral evidence. We were told that, in one court area at least, the defence were requiring the Crown to call all those who had played any part in the forensic examination of Crown productions, such as DNA samples. Perhaps five scientific staff from a laboratory would have to attend court so that the Crown could lead evidence of every movement of the sample and stage in the analysis. In such cases the defence hope was that there would be a gap in the Crown case which, arguably, might cause it to fail. We would be concerned if it did not prove possible, through the effective use of intermediate diets, to eliminate this unnecessarily cumbersome approach to the proof of what are essentially simple facts: that the sample reached the laboratory, that it was analysed, and that the analysis produced particular results. If the defence wish to challenge the analytical methods or the accuracy of the conclusions this should be made known at the time of the intermediate diet and that is then an issue that must be addressed by the prosecution evidence at the trial.

Proposals for Intermediate Diets

20.8 We have considered whether, as some suggested to us, we should recommend that intermediate diets should be abolished. For those courts in which they are currently regarded as a waste of time and resources that would be a welcome recommendation. However, if intermediate diets were to be abolished the mischief which they were designed to avoid would return in courts where they work well at present. We see no reason why, if intermediate diets can be made to work in some places, they cannot be made to work throughout the court system. We were encouraged by the consultations which we had with those who are involved in intermediate diets to believe that there is a widespread wish that they should work properly or not at all. We are clear that they should continue and should be made to work better. The Committee feels strongly that intermediate diets should be regarded in all courts as an essential part of the process of managing court business.

20.9 There are a number of key elements that we wish to address in considering how to improve the effectiveness of intermediate diets:

- role of the bench;
- ensuring the Crown and defence have the information necessary to proceed;
• the agreement of evidence and witnesses required for trial; and
• ECHR issues.

Role of the Bench

20.10 In general terms we take the view that the bench has a very important role to discharge in ensuring that intermediate diets are an effective stage in the court process. We should make it clear at the outset that we are aware that in many courts intermediate diets are conducted by the bench in a thorough fashion. But we were told that this is not a consistent picture. Judicial experience and consistency of approach, between and within courts, are needed and are capable of raising standards of case management. If the steps which require to be taken are taken in advance of the intermediate diet, the bench will be able to adopt a pro-active role and to secure progress in the case and vice versa. This is an aspect of case management by the bench which would, we think, benefit from additional training, with emphasis on best practice in the management of intermediate diet courts and of individual cases at intermediate diets.

20.11 If, on the other hand, as all too often happens, there has been insufficient preparation for the intermediate diet and the procurator fiscal or the defence is unfamiliar with the case, the court will be frustrated in its attempts to progress the case and prevent the attendance at trial of unnecessary witnesses. There requires to be a change of court culture, involving the Crown and the defence as well as the courts, to make intermediate diets work effectively. The result ought to be that only cases which are genuinely ready to proceed to trial are continued to the trial diet. We take the view that the intermediate diet should not be seen as a bureaucratic stage to be ticked off before the trial gets underway, but rather as a certification that the case is ready for trial.

20.12 Turning to more specific issues involving the role of the bench in intermediate diets, we take the view that the primary responsibility for allowing a case to pass forward from the intermediate diet to trial rests with the judge. We are aware that in some cases the Crown and/or the defence will not be able at the intermediate diet to say conclusively that the case is ready for trial, in terms of whether witnesses have been cited, evidence agreed where possible and pleas discussed if necessary. We are aware that in some such cases, far too many at present, the Crown and/or the defence will assert to the bench that these matters will be in order in time for the trial. If the court is satisfied that the case will indeed be ready to proceed on the day of the trial it should of course be continued to the trial. However, if we are to reach a position where intermediate
diets are a real check on the preparedness of cases for trial, if the court is not so satisfied, the intermediate diet should normally be continued to ensure that the outstanding matters have been dealt with before the trial. All applications for adjournment of trials should be closely scrutinised on their merits. We recognise that there will be occasions where the interests of justice demand that the trial be postponed. But the emphasis should be on progressing the business in the court, and to that end the court programme should be so designed to allow early adjourned trial diets to be fixed (say within four weeks) to discourage spurious applications for adjournment.

20.13 We are aware that what we propose will be considered to be difficult and may run the risk of appearing to lead to further pressure on court time in the first instance. Nevertheless we are convinced that without a culture change, which will require the co-operation of all involved, particularly the Crown, the Court Service and defence agents, but most importantly, led by the bench, there will be no change to the conduct of intermediate diets. We were told (and agree) that it is essential that all the judges in a particular court adopt the same approach to intermediate diets.

Section 148(2) of the 1995 Act

20.14 The present position in terms of section 148(2) of the Act is that if, at an intermediate diet, the court concludes that the case is unlikely to proceed to trial, the court “shall” postpone the trial diet unless, having regard to previous proceedings in the case, it considers it inappropriate to do so. We are concerned that the way that this provision is expressed is not consistent with a more proactive court accepting responsibility for judicial case management (which we regard as essential) and may contribute to the numbers of unnecessary adjournments. We would prefer that the emphasis be changed so that a court might more easily conclude that a continuation of the intermediate diet without adjourning the trial is the appropriate outcome if a case is not ready to proceed to trial.

Section 148(4) of the 1995 Act

20.15 In terms of section 148(4) of the Act: “At an intermediate diet, the court may ask the prosecutor and the accused any question for the purposes mentioned in sub-section (1) above.” In our view section 148(4) requires the court to ask questions to ascertain the matters referred to in that section if the information is not provided by the Crown and the defence. It is not clear how far the court can legitimately go in terms of sub-section (4) in asking questions as to
what will be in issue at the trial and which particular defences are to be run at the trial. For reasons which we will explain, we consider that this should be clarified with a view to enabling the court to identify the issues which are to be in contention at the trial, encouraging the agreement of the evidence of witnesses in relation to matters which are not contentious and reducing the numbers of witnesses who have to attend the trial.

20.16 We are aware that some courts have adopted a consistently robust approach by asking such questions. We are unaware of any appeal having been marked, challenging that approach. That is a constructive role for the court. It is designed to ensure that the trial takes no longer than is required, with no more witnesses attending court than are necessary. We are also aware of courts whose approach has been much more cautious. We recommend that section 148(4) be amended to make it clear that the bench may ask any questions relevant to the identification of the issues which will be in contention at the trial with a view to minimising the witnesses required to attend the trial.

Sentence discount at intermediate diet

20.17 If a sentence discount is available and known to be available, and if it is applied consistently at intermediate diets up and down the land and across each court, there will be an incentive to resolve those cases which should be resolved. We envisage that it would be rare that any discount of sentence would be available at the trial diet. We do not say that there will be no circumstances in which some small discount might be appropriate on the day of the trial, because we can envisage some, but not many. Sparing a witness the need to go into the witness box to recall a particularly harrowing experience could be reflected to some extent in the sentence, if there was a good reason for a last-minute change of mind. But in the generality of cases we see no reason for the courts to allow any discount of sentence for a plea on the day of the trial or during the trial. Accordingly we recommend that at the intermediate diet the court should confirm that the accused is aware that a sentence discount is likely to be available at that stage but is unlikely to be available at the trial diet.

50 On sentence discounting more generally see paragraphs 14.12 to 14.21.
Ensuring Equality of Information

20.18 We have already dealt (in chapter 14) with the need for the Crown to ensure that a summary of the evidence is provided to the defence with the service of the complaint and we will consider the desirability of the police obtaining signed witness statements (in chapter 21). We take the view that if the defence are to be expected to come to a realistic position on their case at the intermediate diet they need to be fully aware of the evidence that the witnesses cited by the Crown will give if called. Consequently we propose that full signed civilian witness statements taken by the police and police witness statements should be made available to the defence sufficiently far in advance of the intermediate diet for them to receive proper consideration. Similar considerations apply to other types of evidence, such as productions and access by the defence to copies of audio, video and CCTV tapes. We would suggest that the defence should have copies of the statements and the opportunity to have access to productions, tapes and other recordings as soon as possible and certainly no later than 7 days, where an accused is in custody, and 14 days, where an accused is at liberty, before the intermediate diet.

20.19 The intermediate diet should be seen as the last opportunity before the trial to adjust and tender a plea if one is to be tendered. In most cases the intermediate diet should be the last stage at which the Crown takes a decision not to proceed with the trial. It follows that the Crown must ensure that it is fully informed before the intermediate diet. A decision by the Crown, on the day of the trial, for whatever reason, not to proceed further with the case comes too late to avoid the inconvenience and expense to most, if not all, of the witnesses and others attending court that day and, further, may cause valuable courtroom, judicial and practitioner resources to be wasted.

20.20 So far as the defence is concerned, under the regime which we propose, they should have available to them before the intermediate diet all the information which they require to take full instructions from the accused as to what plea is to be tendered. We can see no reason why, at the intermediate diet, a decision should not be taken as to any plea which should be tendered. There seems to be no reason why that decision should be postponed until the day of the trial. It should not be postponed in the hope that an essential Crown witness will not turn up for the trial. There should be an incentive not to postpone such a decision. Both sides should by then be fully and properly prepared.
Special defences

20.21 Bearing in mind the need to ensure trials proceed on a basis of equal information, we are of the view that, where the defence intend to rely on a special defence of alibi, self-defence, incrimination, insanity or any statutory defence, then this, together with details of any potential defence witnesses, should be intimated no later than the intermediate diet or any continuation thereof. We recommend that the law should be changed in this respect. There would require to be a statutory exception to this requirement which the court could grant on cause shown, particularly to address situations where the Crown had failed to fulfil their obligations to the defence. We have considered whether the defence should be required by statutory provision at the intermediate diet to disclose to the Crown and the court all intended lines of defence. That is a matter which could be a subject for consultation. However, our view is that such a requirement could raise difficulties, particularly in terms of the ECHR, which could not easily be resolved by legislation. Further, in the course of a trial an unforeseen but ultimately successful line of defence may emerge, of which an accused should not be deprived.

Discussion Between Parties in Advance of the Intermediate Diet

20.22 We see real advantages for the Crown and the defence discussing in advance of the intermediate diet the matters referred to in section 148(1) and have considered whether to recommend a statutory requirement for there to be such a meeting prior to the intermediate diet. Although we see great value in such a meeting we think that a statutory requirement for it would be difficult to enforce given the lack of any credible or proportionate sanction. We do not think that such a meeting need necessarily be face to face. The important thing is that the issues are considered by both sides in a constructive way and that each discloses their position to the other. That could be done by an exchange of e-mails or a telephone conversation, as long as the issues are properly addressed. Such an exchange should take place no later than the day before the intermediate diet. We are of the view that this is an issue where best practice, driven by a proactive bench, is the way most likely to achieve progress and that that would be preferable to a statutory requirement on the Crown and the defence to discuss the case.
Agreement of Evidence and Witnesses Needed for the Trial

20.23 Section 257 imposes on the Crown and the defence a duty to seek agreement of evidence. It provides, in part, as follows:

“(1) Subject to subsection (2) below, the prosecutor and the accused (or each of the accused if more than one) shall each identify any facts which are facts -
(a) which he would, apart from this section, be seeking to prove;
(b) which he considers unlikely to be disputed by the other party (or by any of the other parties); and
(c) in proof of which he does not wish to lead oral evidence, and shall take all reasonable steps to secure the agreement of the other party (or each of the other parties) to them; and the other party (or each of the other parties) shall take all reasonable steps to reach such agreement.”

Section 256 (minutes of agreement or admission), section 257 (duty to agree uncontroversial evidence), section 258 (notice of uncontroversial evidence), sections 280 and 281 (routine evidence) and various other provisions of the Act, many of which implemented various recent recommendations by the Scottish Law Commission,51 set out procedures for seeking to agree non-contentious evidence.

20.24 Section 257 is not complied with in large numbers of cases in which it might have a part to play. There are many summary criminal trials at present in which police and civilian witnesses are cited to attend court to give evidence when the evidence which they are likely to give is of a relatively formal or straightforward nature over which there is no material dispute. Section 257, if used as intended, could make it unnecessary for them to attend court. Commonly one or two police officers attend court to give evidence about each aspect of the case. If evidence is not disputed the first officer may not be cross-examined; the second is then not called. Very large numbers of witnesses attend court but are not called, frequently because the evidence which they would have given is not contentious. Examples of such evidence include:

• the cautioning and charging of accused by the police and the response to such charges;
• the transmission of documentary and other productions, for example, from the scene of a crime to an analyst;
• the testing of the accuracy of police car speedometers in some speeding cases; and
• the ownership of property which has been stolen.

20.25 The extent to which evidence will not be in contention at the trial is to a very large extent capable of being resolved at the intermediate diet. It is in the interests of the victim and the potential witnesses that it should be so resolved and it is in the wider public interest that trials should not take longer than necessary. Only witnesses who in the interests of justice are essential to the case should be required to attend personally to give evidence at the trial. Accordingly, we can see no reason in principle why the court should not actively intervene to try to prevent witnesses, whose evidence is not in material dispute, from being required to attend court. That means that the court must be able, at the intermediate diet, to ascertain which issues will, and which will not, be contentious at the trial.

20.26 The Committee considered how best to strike a balance between the rights of witnesses not to be cited unnecessarily and the rights of the defence to put the prosecution case to the test and confront prosecution witnesses. We considered whether the court should be provided with signed statements of the evidence of witnesses, which are claimed by the Crown or the defence to be non-contentious, at the intermediate diet and should be empowered to direct that the evidence of these witnesses as recorded in these statements should be the evidence of that witness in the case, with no need or, indeed, right for parties to cite the witnesses at the trial. Solicitors with whom we discussed that proposal pointed out that very often police statements of particular witnesses will have been taken from the point of view of what appears to the police at that time to require proof. Some matters to which the witness could speak may not be covered and the statements may, to that extent, be incomplete. While our overriding concern remains to minimise the number of witnesses cited unnecessarily, we can see the force of that argument, although (given the nature of routine and uncontroversial evidence) we judge that omissions will rarely be material to the case.

20.27 We therefore recommend that where evidence of a witness contained in a signed witness statement and notified to the other party in advance of the intermediate diet as uncontroversial appears to the court to be non-contentious,
the court should, on the application of either the Crown or the defence, have power to direct that that statement shall be admissible as evidence in the case. The new power could not be exercised without the court hearing both the Crown and the defence, and being able to form a view that it is not necessary in the interests of justice for that witness to attend court to give oral evidence. Any such direction would require to be recorded or minuted. This proposal will require amendment to the time limits set out in sections 258, 280, 281, etc. for notification of uncontroversial and routine evidence (for details, see paragraph 20.32 below).

20.28 In practice it will normally be the Crown which is seeking agreement of uncontroversial evidence. If the defence is unable or unwilling to provide a sufficient explanation of why a particular witness requires to attend court to give oral evidence, the court should have power to direct that the signed statement of the witness concerned will be admissible as evidence in the case and that it is not necessary for the Crown to call that witness (see chapter 21 for discussion of our recommendation that such statements should be rendered admissible). Where the court has given such a direction but the defence wish the witness to give oral evidence, the defence should continue to have the right to call that person as a witness on its own behalf. The same should apply to the Crown in relation to defence witnesses whose evidence is contained in a signed witness statement.

20.29 If a witness is not cited by the opposite party to give evidence, the statement will then be admissible evidence of the facts to which the witness attests. If the witness is cited, the judge will have two sources of admissible evidence in relation to the relevant facts and it will be for him or her to assess their relative weight. This change should not preclude the present practice of using an inconsistent prior statement by a witness to test the credibility and reliability of that witness, i.e. if the witness contradicts or departs from what is in the statement.

ECHR Issues

20.30 We do not believe that our proposals for intermediate diets would contravene Article 6 nor any other Article of the European Convention on Human Rights. Article 6(3)(d) provides that the accused has the right “to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”. The court may properly assess the relevance of proposed evidence. The use of signed statements obtained at earlier stages in the
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process is not inconsistent with this provision, provided that the rights of the defence are respected. (See Reed & Murdoch: Human Rights Law in Scotland at p. 363) “As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him or her, either when he makes his statement or at a later stage. Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness.” (Mellors v United Kingdom 2003 SCCR 407 at page 420D).

20.31 The Committee takes the view that the court should have an informed opportunity at the intermediate diet to consider the relevance of the proposed evidence and should be able to make directions as to the extent to which oral evidence is necessary at the trial, but should not be able to make a direction in such a way as to deprive an accused of the opportunity to challenge any prosecution witness at trial nor to lead any evidence which he or she regards as contentious.

20.32 We believe that our proposals in relation to intermediate diets strike a fair balance. Notice will be given to the accused of the Crown case and of the issues which the Crown consider to be relevant (in the form of a summary of the evidence along with the complaint, together with copies of full signed witness statements, in advance of the intermediate diet). Where the Crown seeks to argue that certain evidence is routine or uncontroversial, the defence will have been so notified in advance of the intermediate diet under revised time limits in amended sections 258, 280, 281, etc of the 1995 Act.

20.33 Our proposals are also designed to enable the court to ascertain which issues are to be disputed at the trial and on that basis to take a view as to whether it is necessary to hear all the possible witnesses at the trial. If the court directs that the statement of a witness should be treated as evidence of that witness at the trial, the accused would not be deprived of the opportunity of having that witness examined in person. The witness can nevertheless be called by the defence.

Best Practice

20.34 In summary we envisage best practice for intermediate diets would include the following:
Prior to intermediate diet:

i. the Crown should provide the accused’s solicitor or, if no solicitor has been appointed, the accused, with copies of police and signed civilian witness statements and copies of relevant documentary productions. This should be done as soon as reasonably practicable, but in any event at least 7 days before the intermediate diet if the accused is in custody, and at least 14 days before the intermediate diet if the accused is at liberty. In addition facilities should be made available for any label productions to be inspected and any CCTV, video or audio taped evidence to be viewed or heard before the intermediate diet;

ii. the Crown should identify and intimate which statements and other evidence, such as tapes, are considered to be non-contentious and which witnesses they intend to cite. Any statement considered to be non-contentious should be signed by the witness;

iii. both Crown and defence should make full use of the provisions of section 257 of the 1995 Act and the various procedures which lead to the agreement of non-contentious evidence;

iv. Crown witnesses should be cited sufficiently far in advance of the intermediate diet for executions of service to be available at the diet in order that the court will know that the trial is in a position to proceed;

v. the solicitor for the accused should be properly briefed and in receipt of full instructions prior to the intermediate diet and in time to permit the exchange with the procurator fiscal;

vi. the Crown and the defence should discuss, no later than the day before the intermediate diet, face to face, by an exchange of e-mails or by telephone:

- the matters referred to in section 148(1);
- any point about the evidence which requires clarification;
- whether a reduced plea would be accepted and;
- the agreement of non-contentious evidence, having regard to the relevant sections of the Act.
At the intermediate diet

i. the court should ascertain whether the case is likely to proceed to trial on
the date assigned for the trial. The Crown and the defence should inform
the court whether any witnesses have not been cited, the number of
witnesses to be called, the probable length of the trial, whether it should
be part-heard and whether the trial should have priority over other trials,
e.g. because there are vulnerable witnesses. The intermediate diet should
be seen as providing certification that the case is ready to proceed to trial
on the date assigned;

ii. the court should seek confirmation that the accused has been made
aware that a sentence discount will be likely to be available for a plea of
guilty at that stage but is unlikely to be available at the trial;

iii. if there is to be a plea of guilty, either as libelled or to a reduced plea,
that plea should be tendered at the intermediate diet;

iv. the court should warn the accused that if he or she fails to appear for
trial at the appointed time the trial may proceed in absence;

v. the court should ascertain which issues will be in contention at the trial
with a view to minimising the number of witnesses required to attend to
give evidence for both the Crown and the defence;

vi. if there is scope for agreement of non-contentious evidence, it should be
agreed at the intermediate diet;

vii. if the evidence of a witness has been identified by the Crown as routine
or non-contentious, a signed witness statement should have been
provided before the intermediate diet to the accused or his or her
solicitor and certified under section 258 as uncontroversial or section
280 or 281 as “routine”. If agreement has not been reached as to
whether the witness requires to attend court to give evidence, the court
should hear parties as to whether it is in the interests of justice that the
evidence of that witness as contained in the statement should be given
orally. In the event that the court takes the view that it is not necessary
in the interests of justice that the evidence be given orally, the court
should make a direction that the signed statement of the witness be
produced at the trial as admissible evidence in the case. This should be minuted by the clerk of court. Only witnesses who are essential to the case in the interests of justice should be required to attend personally to give evidence. Witnesses who are to give only formal evidence should not be required to attend. If the court gives a direction that the statement of a Crown witness should be treated as admissible evidence in the case and the defence wish that witness to give oral evidence, the defence should indicate whether it intends to call that witness as a defence witness. Similar procedures should apply in relation to defence witnesses whom the Crown wish to call;

viii. if the court is satisfied that the case is or will be ready to proceed to trial, it should be continued to the trial diet. The court should be informed by both the Crown and the defence if any special equipment is required, e.g. to play CCTV tapes. The court should be informed if any special facilities are required for vulnerable witnesses;

ix. if the case is not ready to proceed to trial, the court should fix a further intermediate diet or postpone the trial diet;

x. the court diary should allow adjourned trials to be accommodated at an early date, normally no more than 4 weeks later.

We recommend that intermediate diets should continue, that they should be made more effective and that judges should receive additional training in the management of them.

We recommend that section 148(2) of the 1995 Act be amended so that there is not a presumption that a trial will be adjourned.

We recommend that section 148(4) of the 1995 Act be amended so that the bench may ask any questions relevant to the identification of the issues which will be in contention at the trial with a view to minimising the number of witnesses required to attend the trial.

We recommend that either party should be given the right to challenge the refusal of the other party to accept the evidence of a witness as non-contentious and seek a court direction on the matter.
We recommend that in such circumstances, if the evidence of a witness appears to the court to be non-contentious and if the signed statement of that witness provided to the court appears to cover all material issues to which that witness is likely to be able to speak, the court may, having heard both parties, direct that that statement shall be admissible evidence in the case without the witness having to speak to it.

We recommend that where such a direction has been made the party who did not accept that the evidence was non-contentious, may cite the witness to the trial.

We recommend that in such circumstances, both the statement of the witness and his or her oral evidence should be admissible evidence at trial.

We recommend that at the intermediate diet the court should seek confirmation that the accused has been made aware that a sentence discount is likely to be available for a plea of guilty at that stage but is unlikely to be available at the trial.

We recommend that statutory and common law special defences should be intimated no later than the intermediate diet or any adjournment of that diet.

We recommend that not more than about 30 intermediate diets should be set per part court day.
Chapter 21

WITNESS STATEMENTS

21.1 We have referred at various points in this report to our view that in order to secure the swifter disposal of summary business it is important that the Crown and the defence are able to judge the strength of a case and in particular the evidence that a particular witness might give at trial (see, in particular, chapter 14). Only in this way are both sides able to judge whether to pursue or contest aspects of the complaint and thus avoid unnecessary, or longer than necessary, trials with the attendant cost to the system and to witnesses. In this context a signed witness statement taken as soon as possible after the events witnessed is clearly likely to be particularly valuable.

21.2 Such signed witness statements are not routinely produced for summary cases in Scotland. However, it is normal practice in England and Wales for signed witness statements to be taken by police either at the scene or soon afterwards and for these statements to be made available to the defence and to the court. We have given serious consideration to whether we should recommend that the police in Scotland do likewise.

21.3 ACPOS and other police organisations were firmly of the view that routinely gathering such witness statements would be a very labour intensive process and would not be the best use of police time, particularly in cases which are not likely for one reason or another to result in a trial, e.g. because they are likely to be dealt with by the offer of a fiscal fine. We note there are ongoing discussions on this subject between the police and COPFS and are aware that signed witness statements are sometimes produced in cases prosecuted on indictment. We are sympathetic to the view that requiring police officers to complete more paperwork, especially in cases that are unlikely to proceed to trial, is not a sensible use of resources. Nevertheless, given the potential advantages to be derived from doing so we recommend that for all cases in which a not guilty plea has been tendered and a summary trial has been fixed, full signed witness statements should be prepared by the police, if they have not been prepared earlier.

21.4 We recommend that section 258 of the 1995 Act, which deals with uncontroversial evidence, be clarified to ensure that the Crown and the defence may serve a statement (of the kind referred to in that section) relating to the signed witness statements of witnesses whose evidence is considered unlikely to
be disputed. If that statement is not challenged within seven days of service the facts specified are deemed to have been conclusively proved. If signed statements of witnesses were to be included, the absence of a challenge should, we think, lead to the witness statement being admissible and being read to the court as the evidence of the witness concerned.

21.5 We note that the Criminal Justice Act 1967, section 9 (which applies to England and Wales) provides that a written statement by any person shall “be admissible as evidence to the like extent as oral evidence to the like effect by that person”, if certain conditions are satisfied. These conditions are that: the statement purports to be signed by the person who made it; the statement contains a declaration by that person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he or she would be liable to prosecution if he or she wilfully stated in it anything which he or she knew to be false or did not believe to be true. Such a statement which has been admitted in evidence will usually be read aloud in full at the trial but may, if the court so directs, be summarised in open court. We envisage that conditions similar to those would require to be prescribed for Scotland.

21.6 We recommend that witness statements, which have been written by the witness or which have been read over by (or to) the witness and signed by him or her, should be admissible as proof of their contents. That should be so when the evidence has been agreed by the parties as at present, when unchallenged in terms of section 258 of the 1995 Act revised as proposed or, as discussed in the previous chapter, when the court, at the intermediate diet, has directed that such evidence is uncontroversial and that the witness is not required to attend court to give oral evidence. In any of these circumstances it should be competent for the Crown or the defence to read such statements to the court in lieu of oral evidence.

21.7 The Committee realises that treating a signed witness statement as admissible evidence, which may take the place of the oral evidence of that witness, will necessitate an amendment to the law of evidence and a departure from the principles underlying the rules on hearsay and “best evidence”. It is well known that the law in this area evolved many years ago as a result of the accusatorial nature of the criminal trial of the 17th and 18th centuries and it is often argued that in many respects these historical rules are no longer justified by
present circumstances.\textsuperscript{52} That is why, following a review by the Scottish Law Commission, statements in “business documents” were rendered admissible in the 1995 Act.\textsuperscript{53} Similarly, the rule against hearsay evidence has virtually been abolished in civil proofs and has been already been qualified in some respects in criminal procedure.\textsuperscript{54} The reform suggested by the Committee would simply represent another step in the modernisation of the criminal justice system.\textsuperscript{55}

21.8 It is certainly arguable that a statement given by a witness shortly after the relevant events is more likely to be an accurate account of those events than his or her oral testimony in the witness box usually at least several months later. There is a risk, of course, that such evidence may have been misinterpreted or manufactured by the person taking the statement. Primarily for this reason, the Scottish Law Commission did not favour making such statements generally admissible as evidence at trial,\textsuperscript{56} despite its initial view that the English position should be adopted.\textsuperscript{57} In our view, however, a limited judicial discretion in certain circumstances, as recommended in the preceding chapter, to direct that non-contentious statements are admissible, along with the right of the other party to cite the witness to trial, provides sufficient safeguards against this danger. The problem should also be minimised as a result of the requirement that such statements must be signed by the witness who would, in effect, certify that he or she signed it knowing that a false statement would be likely to lead to prosecution. Further, this risk is clearly less significant in modern times, when such statements are taken by trained police officers, than it was at the time of the formulation of the rules, when evidence about what a witness was alleged to have said would normally have come from one of the protagonists to the dispute, in most cases the victim or complainer, who clearly would have had a strong motive to misinterpret or manufacture such evidence.

21.9 It might be objected that this reform would offend against the principle that all testimony should be subjected to cross examination in order to test its truth and accuracy (and, hence, Article 6(3)(d) of the ECHR) but, as explained in the previous chapter (paras 20.28 – 20.29), it will always be open to either side, in

\begin{itemize}
  \item \textsuperscript{52} J. Langbein, The Origins of Adversarial Criminal Trial (Oxford University Press, 2003).
  \item \textsuperscript{55} See, generally, Scottish Law Commission (1995).
  \item \textsuperscript{56} Scottish Law Commission (1995), paras 7.10-11.
\end{itemize}
practice usually the defence, to cite the witness for trial. To recap, if the prosecution claim that the evidence of a particular witness is uncontroversial but the defence disagree, it will be for the judge at the intermediate diet to determine whether the evidence is indeed uncontroversial. The fact that the judge plays an active part in this process should also help allay the concerns of the Scottish Law Commission, who clearly did not envisage this possibility because of their adherence to a model of judicial passivity,58 which we do not favour (see chapter 26 on the role of the bench). If the judge rules in favour of the prosecution, the signed statement of the witness will be admissible as proof of its contents as part of the prosecution case but it will still be open to the defence to cite that witness to trial. In such an event, the statement of the witness remains admissible and will form part of the prosecution case and, if the witness departs from its terms in his or her oral testimony when being examined by the defence, it will be for the court to weigh up both accounts and determine where the truth of the matter lies.

21.10 As we have already described in relation to the conduct of intermediate diets, copies of signed witness statements should be made available to the defence 7 days in advance of the intermediate diet, where the accused is in custody, and 14 days in advance where the accused is at liberty. The timetables in sections 258, 280 and 281 of the Act, which allow notices of uncontroversial or routine evidence to be served up to 14 days before the trial diet, should be amended to reflect this new timetable and the emphasis now placed on resolving evidential issues at the intermediate diet.

21.11 Many defence solicitors to whom we spoke, while supportive of the proposal to produce signed witness statements, told us that they would wish to retain the right to precognosce witnesses. We recognise that, certainly at the outset of any new arrangements, there will continue to be a wish to test the accuracy of witness statements as a guide to the evidence which that witness might give. However, in the longer term, we would hope that the need for precognition of witnesses on behalf of the Crown and each of the accused in a particular case would greatly diminish. We were told that many witnesses find precognition to be an uncomfortable part of the process, especially when they are approached separately on behalf of one or more accused as well as the Crown. We do not have any specific recommendations to make on the multiple precognition of witnesses.

We recommend that for all cases in which a summary trial has been fixed full signed witness statements should be prepared by the police.

We recommend that section 258 of the 1995 Act be clarified to confirm that the Crown and the defence may serve a signed statement (of the kind referred to in that section) relating to the signed witness statements of witnesses whose evidence is considered unlikely to be disputed and that unchallenged witness statements should be the evidence of the witnesses concerned.

We recommend that similar provision be made to deal with other types of non-contentious evidence; for example, the provisions for routine evidence in sections 280 and 281 of the 1995 Act.

We recommend that the time limits in sections 258, 280, 281, etc. for the service of a notice of uncontroversial evidence or routine evidence of 14 days before trial be changed to 7 days before the intermediate diet where the accused is in custody and 14 days where he or she is not.

We recommend that conditions be prescribed which, if satisfied, would make a signed witness statement potentially admissible in evidence.

We recommend that a statement made by a witness to a police officer which is recorded verbatim and read over to the witness and signed by him or her should be admissible in court without being spoken to by a witness where it is agreed between the parties that the statement shall be the evidence of that witness, where such a statement has not been challenged under section 258 procedure revised as proposed, or where, having heard both parties, the court has directed at the intermediate diet that the statement shall be admissible evidence in the case. Such statements should be read aloud to the court in the course of a trial as admissible evidence of the facts to which the witness attests.
Chapter 22

PRODUCTIONS FOR SUMMARY CRIMINAL CASES

22.1 In the course of a year a large amount of property is seized by the police as potential productions for criminal cases but of that only a very small proportion is ever produced in court. Some productions, such as perishable items, may have to be destroyed before they can be produced in court. Many productions are not retained – productions, such as alcohol and cigarettes which do not differ from other alcohol and cigarettes of the same brands in any relevant particular, ought to be and usually are routinely returned to the owner of the property. In spite of this many productions are retained – but few ever reach a courtroom. Of those that do not all are referred to in evidence. Storage in secure conditions of large numbers of productions (some of them bulky), accounting for them, and moving them to courts in anticipation that a trial will proceed on a particular day is expensive. The retention and production of documentary and other productions is not an issue of application only to summary cases. It affects cases prosecuted on indictment also.

22.2 We are informed that practice with regard to retention of productions varies across the country with a bias towards retention until a decision is taken to return them once it is known that they are not required for a trial. In West Lothian, as a result of a policy decision, very few productions are retained by the police. The bias in West Lothian is to return them unless they clearly have to be retained. The practice in West Lothian has not so far been challenged.

22.3 The retention of productions for trial is essential in relatively few cases. There may be something about the production which is crucial to the proof of the case or to the defence of it. A knife which has allegedly been used to commit the offence or clothing worn by the accused soon after the offence was committed may be crucial to the outcome of the case. DNA evidence or fingerprints similarly may be of the utmost importance. Original documentary productions may have features which are of great significance in trials for fraud or embezzlement. They and others which may affect the outcome of a case should be retained. Some of these productions would not be returned in any event. The more difficult issues arise with items of property owned by individuals or businesses. Such property should not, we think, be retained for no better reason than that it might be needed for completeness. Victims of theft, particularly housebreaking, should not be deprived of their own property once it has been recovered unless it really is
necessary to do so. Controlled drugs which are the subject of a prosecution, in most cases, do not need to be produced in court.

22.4 We recognise however, that at present the production itself is the “best evidence” and must be spoken to. If it is not there may be a submission of no case to answer and the Crown case may fail. For that reason to safeguard their position the police and the Crown consider it necessary to retain many productions in case they are required even though they know that most will not be used. Their difficulty is that they cannot always foresee which ones will prove to be necessary. We have been told that the current bias in most areas towards retention causes problems for the owners of property being held as well as storage and management problems for the police, the Crown and the courts. We suggest that the best way forward would be for a working party to review this issue with the aims of clarifying the position and identifying whether there is a need for legislative change. It may be that guidelines would be sufficient though we would expect that these would be provided by judicial decision in the course of a suitable High Court appeal. We would expect that any guidelines would identify the categories of productions which should be retained, the circumstances in which they should be retained and in what circumstances the use of photographic evidence as opposed to the retention of the production would be acceptable. We believe that it would be helpful to define the circumstances in which photographs of productions may take the place of the productions themselves. We take the view that it is highly desirable that the numbers of productions currently retained in police stations, procurator fiscals’ offices and courts throughout the country should be reduced.

We recommend that the need for the police to retain productions with a view to trial should be reviewed with the aims of clarifying the law, e.g. by legislative change or the provision of guidelines, and reducing the amount and types of property which it is necessary to retain for possible production at a trial.
Chapter 23

EVIDENCE OBTAINED USING VIDEO TECHNOLOGY

23.1 It is technically possible for police officers to be fitted with a wearable video camera. Such a camera can record events as they happen but it can also record an image of the accused and conversations between a police officer and persons present at the scene of an incident. The cautioning and charging of a suspect could be recorded in this way. Such recordings can have the time of them incorporated into the recording itself.

23.2 If this technology is to be widely introduced, as we think it will be, provision must be made for that evidence to be used in court in a fair but cost effective way. The cautioning and charging of suspects and their replies to the charges is normally a matter of evidence for which either one or two police witnesses may be cited to attend court. The percentage of cases in which the cautioning and charging of a suspect is challenged is very small. The process of cautioning and charging suspects, where that process has been video recorded should be regarded as routine evidence which is open to challenge in the usual way. A copy of the video recording would have to be served on the accused in the usual way and if unchallenged could be played in the course of a trial. We would not envisage that it should be necessary for any police officers to give evidence in relation to a matter such as that where no challenge had been made.

23.3 If there were to be a video or audio recording of the event as it happened (e.g. on CCTV) that would normally be regarded as “best evidence” and played at the trial. Witnesses describing to police officers what they had seen happening a short time before might also be better evidence than the evidence of these witnesses based on recollection many weeks or possibly months later.

23.4 We recommend that, where there is CCTV evidence or other recorded evidence of events as they happened, it should be made possible to lead that evidence without it being necessary for a witness responsible for making, monitoring or obtaining the recording to attend court to speak to it, such as a police officer or a CCTV operator. A letter or certificate from the relevant organisation as to the provenance of the evidence should suffice.

23.5 We further recommend that video evidence of witness statements should be treated in the same way as signed witness statements in relation to the
Evidence Obtained Using Video Technology

procedure for such evidence to be agreed as uncontroversial (see chapter 21 above). Where such evidence is either agreed to be uncontroversial, is unchallenged or the court so directs, it should be admissible evidence in the case. The Crown or the defence should be able to use that evidence without it being necessary for one or more witnesses to speak to the recording of it. It would still be open to the Crown and the defence to cite such witnesses to the trial where their oral testimony would also be admissible evidence.

23.6 It may be that with improved voice recognition software the transcription of at least parts of such recordings may not prove to be too expensive. If so, it may be possible and reasonably cost effective to prepare transcripts in some cases but we do not recommend that that be done routinely. If these recommendations are accepted we would envisage that at an intermediate diet the number of witnesses who are required to attend court for trials would be reduced in cases in which there are video or audio recordings. It is worth noting that use of technology such as this, while saving time at the beginning of the process, may add work at the trial preparation stage. A good example is the police interview tape - which may take longer for the procurator fiscal or judge to listen to than the time it would take to consider a transcript of the evidence. That said, there will be occasions on which the court may wish to use an appropriate video or audio recording. We would also suggest that it should be competent for video and audio taped evidence to become part of the process where appropriate. If recorded on digital media, it could be stored with an electronic complaint on the appropriate IT systems. With suitable technology, judges could mark relevant sections of the recording for the process as they watched or listened to it, without having to take extended notes.

We recommend that video recordings of the process of cautioning and charging suspects should be regarded as routine evidence.

We recommend that, where there is CCTV evidence or other recorded evidence of events as they happened, it should be made possible to lead that evidence without it being necessary for a witness responsible for making, monitoring or obtaining the recording to attend court to speak to it, such as a police officer or a CCTV operator. A letter or certificate from the relevant organisation as to the provenance of the evidence should suffice.
We recommend that video evidence of witness statements should be treated in the same way as signed witness statements in relation to the procedure for such evidence to be agreed as uncontroversial. Where such evidence is either agreed to be uncontroversial or the court so directs it should be admissible evidence in the case. The Crown or the defence should be able to use that evidence without it being necessary for one or more witnesses to speak to it.
Chapter 24

TRIAL COURTS

Agreement of Pleas

24.1 The latest date, in most cases, on which there should be negotiations between the Crown and the defence to agree a plea is the day of the intermediate diet. At present many pleas are tendered after that time. It was suggested to us that the court should refuse to entertain pleas of guilty other than as charged on the day of trial. We think that that goes too far. We recognise that in some cases, especially those where witnesses are spared giving harrowing evidence, a guilty plea, or a plea to parts of the complaint, even on the day of the trial, will be welcome. An agreed plea should therefore be accepted by the court on the day of the trial but there should be no adjournments on that day prior to a trial starting to see if a plea can be agreed. If a practice of no negotiations after a trial court commenced were to become universal and known, and be firmly adhered to, any necessary negotiations would, we think, take place before trials are due to start.

Call-overs and Ancillary Business

24.2 What happens in many, if not most, courts at present is that the court will sit at, say, 10 a.m. or soon thereafter and call-over the trials (i.e. to determine whether the accused and all the witnesses are present and whether the trial is proceeding or not). This is commonly a symptom of too many trials being set down for trial courts. Once the call over has taken place the procurator fiscal will often seek an adjournment which will euphemistically, but usually inaccurately, be described as “short”. The result often is that in courts where that practice is followed, the first trial may not commence until well after 11 a.m.

24.3 If there is to be the equivalent of a call-over and subsequent negotiation between the procurator fiscal and the defence, that should take place before the time at which the court is due to start. It is very unsatisfactory to have large numbers of witnesses turning up at court for a 10 a.m. start if the court does not sit to hear witnesses give evidence in a trial until much later in the morning. If there are to be pleas on the day, the court should deal with them before the time when the trials are due to start. Witnesses should be cited for the time when the court will start the first trial. They should not be cited to attend court for a time when the court knows that it is likely to be dealing with, for example, cases which are not going to trial that day because there is a plea. We recommend that, in
courts in which it is considered to be necessary to have a call over, the court should commence much earlier for that purpose. Otherwise any trial court should convene at the time when it is due to start and should start the first trial then and there. The court should refuse all adjournments except of cases which it is already known will not, in the interests of justice, be able to commence at all that day. It may be necessary to reduce the number of summary trials set down for each court to achieve that. Although that could conceivably mean that some court rooms are not utilised to their full capacity, we are clear that there will be savings for others, such as witnesses, the cost of adjourned trials will reduce and it will achieve the earlier disposal of cases set down for trial that day.

24.4 Ancillary business, such as deferred sentences should not interfere with the commencement of trials at the scheduled time. If these are to be heard first, the court should sit earlier to deal with them, but in all circumstances should be ready to commence trials at the scheduled time and be able to continue until they are finished for the day. This may require adjustments to the programme in some courts.

Waiting Times for Victims and Witnesses

24.5 There was some support for the view that not all trials should be set down for the same starting time in the morning. Some might be set down for, say, 10 a.m. and others for 12 noon or 2 p.m. or both. In district courts it is easier to schedule trials at different times as they tend to be shorter than trials in the sheriff court, and many district courts do in fact schedule cases in this way. It inevitably happens that on some days the cases set down for the morning do not take place while the cases set down for later in the day do proceed, and sometimes spill over into another day. It is impossible to predict which cases will not go ahead on the day of trial in advance of the day of trial and not easy to calculate how long a trial is likely to take. We do not think that, given the varying caseloads and availability of courtroom resources, it is appropriate to recommend a single solution in terms of a court appointment system.

24.6 We do, however, recommend that courts be given targets, which would be monitored, for the time which elapses between the time when both accused and witnesses are required to arrive at court and the time at which the case in which accused are involved commences and, in the case of witnesses, the time when the witness is called to give evidence. The achievement of targets would be monitored on a sample basis which would be subject to periodic audit (a similar mechanism to that currently used in magistrates’ courts in England and Wales).
We consider that it is better that individual courts experiment with different court programmes to see what works best in that court to achieve optimum efficiency. We emphasise, however, that an essential component in the achievement of optimum efficiency is not just the maximum use of the court room or the judge’s time, but also it is the need to cut waiting times for witnesses, accused and solicitors during the trial day to a minimum. We recommend that courts should aim to require the attendance of witnesses at court no more than an hour on average before they are required to give evidence. Our proposals are designed to reduce the numbers of cases going to trial and the numbers of witnesses cited to trial. Courts in future should take account of the need to minimise costs and inconvenience for witnesses, solicitors and others as well as factors such as the numbers of hours which courts sit in assessing their own efficiency.

24.7 In larger courts experiments which have involved having a back-up court, judge, prosecutor and clerk appear to have been successful. The back-up team takes trials as soon as it becomes clear that more cases are going to trial than the trial courts can deal with that day. Knowledge that the trial will proceed that day concentrates the minds of both prosecution and defence in a way which does not always happen at present. Adjournment of trials on the day of the trial should become exceptional. There should be a requirement to minute the true reasons for any such adjournment.

We recommend that individual courts experiment with different court programmes to see what works best in that court to achieve optimum efficiency. Optimum efficiency must take account of the needs of all court users, including victims and witnesses.

We recommend that there should be no call-over of trials (i.e. to determine whether the accused and witnesses are present and whether the trial will proceed) after the time when the first trial is due to start and that there should be no adjournments after that time to discuss pleas in cases in which the trial has not commenced. If there is to be a call-over, the court should sit earlier for that purpose.

We recommend that the first trial should start when it is due to start and that the court should refuse all adjournments except of trials which cannot, in the interests of justice, commence at all.
We recommend that courts be given targets for the time which elapses between the time when both accused and witnesses are required to arrive at court and the time at which the case in which accused are involved commences and, in the cases of witnesses, the time when the witness gives evidence. We recommend that courts should aim to require the attendance of witnesses at court no more than an hour or so on average before they are required to give evidence.
Chapter 25

TRIAL IN ABSENCE

Background

25.1 The current provisions for trial in absence in a summary case in Scotland are to be found in section 150(5) to (7) of the 1995 Act. These sub-sections provide:

“(5) Where the accused is charged with a statutory offence for which a sentence of imprisonment cannot be imposed in the first instance, or where the statute founded on or conferring jurisdiction authorises procedure in the absence of the accused, the court, on the motion of the prosecutor and upon being satisfied that the accused has been duly cited, or has received due intimation of the diet where such intimation has been ordered, may subject to subsections (6) and (7) below, proceed to hear and dispose of the case in the absence of the accused.

(6) Unless the statute founded on authorises conviction in default of appearance, proof of the complaint must be led to the satisfaction of the court.

(7) In a case to which subsection (5) above applies, the court may, if it considers it expedient, allow counsel or a solicitor who satisfies the court that he has authority from the accused so to do, to appear and plead for and defend him.”

25.2 Trial in absence occurs very rarely at present. In the first place, it is not competent when a common law crime is charged, such as theft, assault or breach of the peace. Secondly, there are restricted categories of statutory offence which can be tried in the absence of the accused. Either the offence must be one for which imprisonment cannot be imposed or the statute creating the offence must authorise trial in absence.

Issues

25.3 In the experience of Committee members many accused fail to appear on the day of their summary trial. Scottish Court Service statistics show that in 2002-03 8% of sheriff court trial hearings – over 4000 hearings – resulted in the
issue of a warrant for the arrest of the accused.\textsuperscript{59} Witnesses present will lose a day’s work, and will be entitled to travel and other expenses. The police, the Crown and the courts will also have incurred abortive expenditure, and defence lawyers will also lose out. Above all, justice is seen not to be done.

25.4 Warrants will be issued for the arrest of the absent accused, but a new trial date will not normally be set until the accused appears on warrant. The full process of witness citation will have to be repeated. In summary cases police witnesses are generally crucial, and the waste of police time involved is therefore considerable – both time lost through an abortive court attendance and the time involved to trace and apprehend the accused.

25.5 For the accused failure to appear can be a deliberate strategy to postpone the trial until witnesses’ memories have faded or (in some extreme cases) until the case has called so many times without proceeding that delay forces the Crown to abandon it. In multi-accused trials one absconder causes the whole trial to be delayed and it is not uncommon for another of the accused to fail to appear at the next trial diet, thus causing a further postponement. An accused arrested on a warrant can be remanded in custody until the rearranged trial, but this is an expensive option which tends to be adopted only when there is a clear pattern of absconding. The fines otherwise imposed for the failure to appear for trial come nowhere near to offsetting the cost of an abortive trial. If an accused is prosecuted for the failure to appear this adds another procedure to the workload of the court. As we have stressed already, however, the real cost of accused failing to appear is that justice is thwarted and the system brought into disrepute.

25.6 The Committee was clear that while the rights of the accused to a hearing before an impartial tribunal were inviolable under ECHR, it was reasonable to expect the accused to take some action to claim those rights. This is in line with our general view (see particularly paragraph 2.7 above) that accused persons should not indefinitely be able to frustrate justice by their inaction. So far as we can discover The European Court of Human Rights has never found an ECHR breach where an individual who had been duly cited to trial voluntarily opted not to attend and had been tried in his or her absence, provided that that jurisdiction’s procedure provided a safeguard enabling the accused to have the matter reopened. It is, of course, open to an accused convicted in absence to appeal

\textsuperscript{59} These figures cover sheriff solemn and summary, but the overwhelming majority relate to summary trial hearings (96\% of cases concluded in the sheriff court in 2002-3 were summary cases). Comparable figures are not available for failure to appear in the district court.
against conviction and/or sentence. Additionally, the House of Lords has recently held that a trial in absence in England, where a defendant failed to appear, is not contrary to Article 6, even where the charges are very serious.60

25.7 We are therefore of the view that, if the court is satisfied that an accused has been informed in writing or has been told of the date of the trial, that he or she is required to attend a particular court for trial on that date and that, if he or she fails to attend, the trial may proceed in his or her absence, it should be competent for the court to hold such a trial. Accused who appear at intermediate diets should routinely be told that if they fail to appear for trial the trial may proceed in absence. Trial in absence should be competent whether the accused has been charged with a common law crime or a statutory offence and whether or not the crime or statutory offence is punishable by imprisonment.

25.8 We recognise the importance for the accused of being able to re-open the matter. The appeal route is, of course, always available. The Committee concluded, however, that there would be advantage in an additional safeguard providing for speedy reconsideration by the court of first instance where a manifest error or injustice has occurred. Our proposals for that safeguard are set out in more detail below (paragraphs 25.18 – 25.19).

Trial in absence in Summary Procedure; Practical Issues

Legal representation

25.9 In the Criminal Procedure (Amendment) (Scotland) Bill, clause 11(3), it is proposed that for solemn cases section 92 of the 1995 Act be amended so as to provide that the court may, on the motion of the prosecutor, allow the trial to proceed and be disposed of in the absence of the accused provided that the court is satisfied that the accused was cited in accordance with the Act and that it is in the interests of justice to proceed in the absence of the accused. A new section 66(6AA) of the 1995 Act will require that notice be given to the accused that, if he or she fails to appear at the preliminary diet or at the trial diet, the case may proceed in his or her absence. Where the court exercises that power it is required to allow a solicitor with authority to act for the purposes of the accused’s defence to continue to do so or, if there is no such solicitor, at its own hand to appoint a solicitor to act for those purposes. A solicitor so appointed is given the

60 R v Jones[2002] 2 All ER 113.
same authority as if engaged by the accused.

25.10 We can understand why, in the serious cases which are prosecuted in the High Court and before a sheriff and jury, it is considered to be necessary that the interests of an absent accused should be protected by a solicitor who has acted for him or her or by a court appointed solicitor. Accordingly, we are not surprised to find that in the proposed new sub-section it is directed that there be such an appointment.

25.11 In relation to summary criminal proceedings we do not recommend that a similar provision be enacted. We would accept that a summary court should be required to allow a solicitor with authority to act for the purposes of the accused’s defence at the trial to continue to act for those purposes. However, if there is no such solicitor, we consider that the court should be given discretion as to whether or not a solicitor should be appointed by the court to act for those purposes. Many infringements of statutory provisions are relatively straightforward. If the accused has never been represented, a court appointed solicitor who, by definition, would not have had an opportunity to meet the accused and take instructions from him or her, could not advance a defence on behalf of the absent accused other than to put the Crown to proof. In a summary criminal court, particularly one presided over by a professional judge, the court will be well able to ensure that the Crown case is sufficiently proved before it considers whether the accused should be convicted.

Identity of the accused

25.12 In many cases which go to trial in the absence of the accused, the identification of the accused will be an issue. In terms of the 1995 Act, section 280(9) it is to be presumed that the person who appears in answer to the complaint is the person charged by the police with the offence unless the contrary is alleged. That person is likely to have appeared and confirmed his or her identity at the pleading and intermediate diets prior to the trial. We understand that persons who are arrested and taken to a police station and charged in connection with an offence are, almost without exception, photographed. We recommend that legislation should make it possible to establish the identity of an offender by photographic evidence where identity is in issue.

25.13 It may be objected that production of a single photograph of the accused might lead to a miscarriage of justice. We very much doubt whether that argument is valid, especially if the evidence is as to the person who was charged by the
police. Accused who are present in court during a trial normally sit in the dock and are clearly seen to be in a different position from members of the public on the public benches. Accused are often identified by witnesses in the course of a trial in which the remainder of the courtroom is either empty or more or less so. That is not objectionable per se.61

Sentencing

25.14 So far as sentence is concerned we consider that, following conviction at such a trial, it should, so far as possible, be competent for the court to impose any sentence which it would be competent to impose for that offence. We do not think that, in the event of a conviction following trial in absence, it should be necessary for the court to issue a warrant for the arrest of the offender in every case so that he or she can be sentenced. At the least the court should be able to impose fines, make compensation orders, supervised attendance orders instead of fines, exclusion orders (from licensed premises) and non-harassment orders.

25.15 We consider that those who are convicted following trial in absence who are either under 21 or who have not previously been sentenced to a period of imprisonment or detention should not be deprived of their current right not to be imprisoned until the court has considered a Social Enquiry Report into their background and circumstances. It follows that, so far as they are concerned, we do not consider that a sentence of imprisonment or detention should be imposed in the absence of the offender.

25.16 In addition, while there might be fewer objections to the court, following trial in absence, being given power to impose a sentence of imprisonment in the case of an offender who is over 21 and who has previously been sentenced to imprisonment or detention by a court in any part of the United Kingdom, we recommend that such sentences should continue to be imposed only in the presence of the offender. Similarly a community service order cannot be made unless the court is satisfied that the offender is a suitable person to perform work under such an order and the offender consents62 and we recommend therefore that it should not be competent to impose such an order in the absence of the offender.

61 Holland v HMA, 2003 SLT 1119.
62 1995 Act, section 238(2).
25.17 Before a court can make a probation order the offender has to express willingness to comply with it. We would not recommend that probation orders should be made in circumstances in which the offender may be unwilling to comply with some or all of the conditions. The conditions attached to a probation order can be tailored to the needs of the individual offender and may, for example, require the offender to undergo treatment for a mental condition either as an in-patient or as an out-patient. It follows, we think, that probation orders should not be made in the absence of the offender.

Safeguard provisions

25.18 Section 142 of the Magistrates’ Act 1980 provides that, in England and Wales, the court may vary or rescind a sentence or other order made when dealing with an offender if it appears to the court to be in the interests of justice to do so. That power allows the fixing of a new hearing of the case. It also enables an invalid sentence or order to be replaced by one which is valid. As we understand the position from visits to magistrates courts in England and Wales, section 142 is seen as a valuable safeguard where trials are conducted in absence. It is however also applicable to other instances where it subsequently appears that the court had proceeded or convicted or sentenced an individual but an error had been made or further information had come to light. For example, a person convicted of using a motor vehicle without insurance may be able to establish at a later date that there was insurance in force at the material time, by producing an insurance certificate.

25.19 We recommend the introduction of a similar provision in Scotland, in particular as a safeguard in relation to trials held in absence of the accused, but also in the wider circumstances mentioned above. We do not propose that such a provision should take the place of the Appeal Court, but rather should provide a quick and inexpensive remedy to correct obvious errors and injustices. In this provision we see a clear parallel with the safeguard mechanism we propose in relation to the collection and enforcement of fiscal fines and similar penalties from para 11.26.

63 1995 Act, section 228(5).
We recommend that trial in absence should be competent whether the accused has been charged with a common law crime or a statutory offence and whether or not the crime or statutory offence is punishable by imprisonment.

We recommend that trial in absence should only take place if the court is satisfied that the accused has received notice that he or she is required to attend trial at a particular time and that if he or she fails to do so the trial may or will proceed in absence.

We recommend that trial in absence should be competent where any counsel or solicitor instructed in the case withdraws.

We recommend that the court should not be required to appoint a solicitor when the accused is unrepresented but should have power to do so.

We recommend that it should be made competent to establish the identity of an offender by photographic evidence where identity is in issue.

We recommend that following trial in absence, a court should have power to impose fines, make compensation orders, supervised attendance orders instead of fines, exclusion orders (from licensed premises) and non-harassment orders.

We recommend that it should not be competent to impose sentences of imprisonment or sentences which require the consent of the accused in the absence of the accused.

We recommend that a provision be introduced in Scotland along the same lines as section 142 of the Magistrates’ Act 1980 in England and Wales, which provides that the court may vary or rescind a sentence or other order made when dealing with an offender and may order a rehearing of the case if it appears to the court to be in the interests of justice to do so.
Chapter 26

THE ROLE OF THE BENCH IN MANAGING COURT BUSINESS

26.1 If the summary justice system is to become and remain summary in future, the role of the bench in the management of court business must be considered. Sheriffs principal are under a statutory duty “to secure the speedy and efficient disposal of business in the sheriff courts in (their) sheriffdom” (Sheriff Courts (Scotland) Act 1971, section 15). There is no similar statutory duty imposed on sheriffs or lay justices. We have considered whether we should recommend that the bench should be under some kind of obligation to achieve a similar objective. We have concluded that the imposition of a statutory duty on the bench in each court would not, of itself, be likely to achieve a useful purpose.

26.2 We note at this point, that although there is a clear statutory duty placed upon sheriffs principal as described above, they do not have the necessary levers to secure efficient case management. Sheriffs principal can control the input of resources into the system, i.e. they ensure that there are sufficient sheriffs in the right place at the right time to deal with the anticipated flow of business, but they have no control over the outputs of the system. We do not, however, think that it is within this Committee’s remit to consider how this situation might be addressed.

26.3 We recognise that many judges do not see themselves as having a role in managing court business. The idea that they might have such a role may be perceived by some as a threat to their judicial independence. They may say that each decision in each case has to be taken on its merits and that how a court performs overall is a reflection of the accumulation of many individual decisions. So, it may be said, there should be no constraints on them as impartial adjudicators in particular cases.

26.4 We would not accept that judges do not manage court business. To the extent that management is about applying skills to make sure that things get done, judges play that role daily by exercising their judicial discretion. They do not have line management responsibility for those who appear before them nor for those who staff the courts. As a result they have to operate to some extent by consensus. They often have to take decisions on issues which may be contentious, such as whether adjournments should be granted and, if so, for how long and whether documents or productions should be allowed to be lodged late. They can set a timetable within which a sequence of actions must be taken. They
The Role of the Bench in Managing Court Business

can accord higher priority to some cases than others. They can bring to an end cases in which there has been unreasonable delay. Though considerations such as the interests of justice will play a very important part in many decisions such as these, these are examples of a different kind of role from what is often seen as the primary role of a judge – substantive decision making.

26.5 In that primary role judges in a summary criminal court have to reach reasoned judgements, having listened to and considered the evidence led and the submissions made to them. In that role the independence of the judiciary is paramount. They must be wholly impartial and not subject to pressures from the Executive or anyone else to decide cases in a particular way. Their decisions are almost always subject to appeal. But the progression of cases from the time they get to court till they are concluded is an exercise of what is essentially, though by no means wholly, a managerial role. Judges should not be influenced by others in reaching the substantive decisions which they do, but hand in hand with their independence goes their responsibility to deliver justice not only of a high standard but quickly and at reasonable cost to both Crown and defence.

26.6 The delivery of high quality justice requires that it is delivered without undue delay. Delay adds to cost and can lead to a denial of justice. Some courts have shown that they manage cases more successfully than do others in terms of the numbers of times they call in court and the average time it takes to bring cases to a conclusion. All courts share an implicit common objective – the delivery of substantive justice which is sound in fact and in law in all cases which come before them within a reasonable time and without undue cost. But at present courts do not know how well they deliver justice in terms of time and cost relative to others. Summary criminal courts should be assisted in their management of court business to ensure that justice is summary, that cases make the progress which they should and that they make that progress in a cost effective way.

26.7 We are aware that in some types of courts the management function of the bench is easier to discharge. In smaller courts, where there is not the pressure of business seen in many of our larger courts, the bench can schedule business more easily to meet the demands of individual cases and secure that proper priority can be given to those cases which justify it. In the larger courts we recognize that a whole system approach is likely to be necessary where all the responsible agencies co-operate to deal with management issues. We note that such an approach was followed for a time in Glasgow Sheriff Court in an effort to deal with backlogs of summary criminal trials and that approach was considered to be successful.
Adjournments

26.8 The Committee noted the considerable variation in courts throughout Scotland in the percentage of diets which are adjourned. The average number of times a case calls in court varies considerably from one court to another. Some courts seem to be able to bring cases to a conclusion much more effectively than others. As far as trial diets are concerned adjournment rates ranged from 9% to 41% in 2002-3. Even excluding small rural courts, there were significant variations from, for example, 23% in Edinburgh, to 35% in Perth and Paisley. Given the numbers of cases with which a busy sheriff court like Glasgow deals, even a marginal movement towards the lower end of this spectrum would have a significant effect on the speed at which the system moves and the numbers of witnesses who are inconvenienced.

26.9 Research conducted by Leverick and Duff suggests that the most important factor in minimising adjournments is management by the bench. Sheriffs were 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 questioned a party requesting an adjournment as to whether it was really necessary. It was noted that in many cases where the defence and prosecution were agreed on the need for an adjournment that fact was often not questioned by the bench.

26.10 During the practitioners’ workshops organised by the Committee, there was discussion of the extent to which there exists an “adjournment culture” in some courts. There was broad agreement that there is such a phenomenon in the workshops in Edinburgh and Glasgow, but less so in the event held in Aberdeen. A number of reasons for the common granting of adjournments were identified, and are dealt with elsewhere in this report, in particular problems with citation of witnesses, ineffective intermediate diets and the need to obtain social enquiry reports.

26.11 A counter view was expressed to the Committee by some of those consulted that allowance had to be made for individual sheriffs and court circumstances. It was important to maintain fairness for both the accused and the Crown. Aggressive challenging of requests for adjournments had, in some courts,
undermined that balance. In any event sheriffs principal had statutory responsibilities for ensuring the efficient running of courts in their area and could decide where and when sheriffs sat and what cases they heard – sheriffs did not have those powers. If it was thought that sheriffs were not sufficiently proactive in progressing cases then it was up to the sheriff principal to intervene.

26.12 While acknowledging the need to maintain fairness and also the fact that adjournments could in some circumstances assist the efficient management of business, the Committee was in agreement with the broad conclusions of the research that if the bench was proactive, fewer adjournments were likely to be requested and those that were requested were more likely to be necessary.

**Management Information**

26.13 It seemed to the Committee that there needed to be a greater consistency of approach to caseload management from those who sat on the bench. Because there are variations within courts between judges in this respect there is a tendency for proactivity on the part of those who favour that approach to become less effective. But there are a few larger courts where there is not the same readiness to grant adjournments as there is in others. Part of the problem is that, in the absence of information to the contrary, each court tends to think that it handles its business well or at least as well as it can in the circumstances.

26.14 In chapter 33 we set out the management information which should be collected in relation to the operation of courts and on a court by court basis (see paragraph 33.20 in particular).

26.15 Only by monitoring the performance of courts in that or a similar way can it become known how effectively particular courts process trial cases. We believe that the information should be provided to judges on a court by court basis at regular intervals showing the extent to which there is deviation from the mean over a period and in a format which demonstrates how well the business of each court is managed over time – to enable them to manage the business in their court in an informed way. Judges should have access, so far as they need it, to the management information which is likely to be gathered by local criminal justice boards.
Training

26.16 We believe that the Judicial Studies Committee has a role to play in training judges in the management of court business. We consider that, for the future, it will be necessary to provide the bench with training in the skills required for the effective management of the business which they handle.

26.17 It could be illuminating for some judges to learn what the consequences of adjournments are likely to be both in cost terms and for those affected by the decision to adjourn and how other judges manage their business apparently more successfully. We should add that we do not see business management and throughput as ends in themselves. That could lead to injustice all too easily. But where there are significant differences between courts in the apparent effectiveness of their disposal of summary criminal business some effort should be made to identify why that is so and to disseminate best practice.

We recommend that the Judicial Studies Committee provide further training for judges in the management of summary court business.

We recommend that management information should be provided to judges on a court by court basis at regular intervals showing the extent to which there is deviation from the mean in relation to the number of adjournments granted at the various states of the process, the overall time taken to deal with cases and the implications for witnesses, victims and accused.
Chapter 27

ALTERATION OF DIETS

27.1 We consider that section 137(1) of the 1995 Act, which allows the Crown and the defence to make a joint written application seeking to have the case call on a date earlier than the date fixed for its next calling, should continue in force. This is a useful provision in many circumstances. It can be and is used to get cases to call together on the same date, for instance.

27.2 However, we consider that section 137(2) of the 1995 Act is inimical to the efficient management by the court of summary criminal business. That subsection provides that: “Where the prosecutor and the accused make joint application to the court (orally or in writing) for the postponement of a diet which has been fixed, the court shall discharge the diet and fix a later diet in lieu unless the court considers that it should not do so because there has been unnecessary delay on the part of one or more of the parties”. The requirement on the court to postpone the case can be almost mandatory. If the application is in writing only, the court may be in no position to determine whether there has been “unnecessary delay”. The court otherwise has an inherent power to adjourn or to refuse to adjourn cases and in other circumstances an unfettered discretion to do so. The Crown and the defence should not be able to fetter that discretion. It may be convenient for both of them to have a particular case postponed. If this subsection is to be retained, at the very least the application should specify in cogent terms the reasons why adjournment is sought. We doubt whether this subsection needs to be retained in its present form. It would be sufficient to provide that such applications may be made jointly either orally or in writing.

We recommend that consideration should be given to repealing or amending section 137(2) of the 1995 Act. If it is thought necessary to retain that subsection it could be amended to specify that applications for postponement of a case should state in cogent terms the reasons why postponement is sought.
Chapter 28

SENTENCING INFORMATION SYSTEM

28.1 Politicians, the media and the public expect sentencing practice to be consistent and uniformly applied as between cases, within courts and between courts. Apparent inconsistency is commonly perceived to be an indicator that there has been injustice. Inconsistency may be much more apparent than real. The circumstances of two superficially similar cases may be radically different. The circumstances relating to the offender and his or her past criminal record may be wholly dissimilar. That said, both plentiful anecdotal evidence and research indicates that sentencing levels vary a great deal from one sentencer to another and from one court to another, to an extent which cannot be accounted for other than in terms of differences in sentencing practice.

28.2 We received evidence that defence lawyers in courts with more than one judge will attempt to arrange that their clients’ cases do not call before a judge who is perceived to be a severe sentencer and that they do call before a judge who is perceived to be lenient. The former can often only be achieved by finding some justification for getting a case adjourned. In the sheriff court this is known as “sheriff shopping” and leads to unnecessary adjournments and continuing adherence to not guilty pleas where the ultimate intention is to plead guilty. We accept that there is scope for greater overall consistency in sentencing. An offender who appears before a particular court should not be likely to receive a sentence which is very different from the sentences which would be imposed in the majority of courts in very similar circumstances.

28.3 A sentencer can only be consistent with other sentencers if he or she is aware of the sentences being imposed by other sentencers or if there are guidelines indicating a general level of sentence for particular types of offence.

making due allowance for aggravating and mitigating factors. Such guidelines have been in use in magistrates’ courts in England and Wales for many years now and are, by and large, found to be very helpful by lay magistrates there. The District Courts Association has been actively engaged in preparing similar guidance for lay justices in Scotland. So far as guidelines in Scotland are concerned, sections 118(7) and 189(7) of the 1995 Act provide that in disposing of an appeal the High Court may pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case to the case then under appeal. In terms of section 197 of that Act a court in passing sentence is required to have regard to any relevant opinion pronounced under either of these sub-sections. The High Court has given some guidance in relation to levels of appropriate sentence through the use of those provisions. However, it has not attempted to formulate guidelines as to the appropriate sentence for particular crimes at all levels of gravity as the Court of Criminal Appeal has done in England and Wales. Recently the High Court provided guidelines in relation to sentence discounting. If guidelines were to be issued for a crime such as theft by housebreaking, all courts would be required to consider the guidance given in determining the appropriate sentence in a particular case.

28.4 One way in which courts could be made aware of the sentences imposed in other courts for comparable offences is by using a sentencing information system (SIS). A modern SIS is a database designed to provide judges with sufficient information to place the offender who is currently before them in a broader context by enabling the judge to learn what sentences have been imposed on similar offenders in broadly similar circumstances. Almost all of the SISs in existence involve a relatively crude analysis of the crime or offence committed and the features of it which may affect sentence, such as the circumstances in which it was committed, the consequences for the victim and the criminal record and age of the offender. Apart from details of the sentence imposed there may be a note of the reasons why that sentence was imposed in that case, especially if the sentence differs from the norm.

28.5 The benefit of such systems is that they display in bar chart form or graphically the types of disposal in comparable cases, and within that type of disposal, the extent of the sentence imposed. In the case of sentences of

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67 Du Plooy v HMA 2003 SCCR 640.
68 The exception being the system recently introduced in Multnomah County, Oregon, USA.
69 See generally: M Tonry and R. Frase (eds), Sentencing and Sanctions in Western Countries (2001); N Hutton and C Tata.
imprisonment there tends to be a relatively closely defined range within which most sentences fall with a few further removed from the norm. In the case of fines a high percentage of the fines imposed are likely to fall within a relatively narrow range. They tend to be grouped around a mid-point. We consider that the availability of information of that kind would be likely to lead judges to impose sentences which are more consistent over time.

28.6 We recognise that there are issues to consider as to whether such a system would encourage judges to impose the appropriate type and level of sentence or not. This seems to us to be a matter that the Sentencing Commission may wish to examine. From the point of view of avoiding sheriff shopping and other phenomena aimed at delaying the progress of cases, we consider that a sentencing information system offers considerable potential.

28.7 We have discussed the possibility of extending the SIS used by the High Court of Justiciary in Scotland or replicating it for summary criminal cases. Our understanding is that that should be possible without great cost. We would not suggest that summary courts should have access to the High Court part of the system in its present form. We would suggest that there should be a system for summary courts which used, so far as possible, the software developed for the High Court.

28.8 The SIS used by the High Court of Justiciary in Scotland can only be accessed by judges of that court. Cases on that system show the name of the judge who imposed sentence. We suggest that the software be modified for summary courts so that access can be made available to COPFS and to defence lawyers in order to further transparency and encourage confidence in consistency of sentencing. We do not believe that the data to which they have access should include the identity of the judge who dealt with a particular case as we would be anxious to avoid arguments in the course of a plea in mitigation directed at the sentencing policy of a particular judge. If that is to be examined at all it should be subjected to objective research.
We consider that a sentencing information system would have benefits in furthering consistency in sentencing and reducing the phenomenon of “sheriff shopping”, thereby encouraging more early pleas. We recommend that this issue be examined further by the Sentencing Commission.

We suggest that a sentencing information system for summary courts could use, so far as possible, the software developed for the current High Court system. We suggest that the software be modified so that access can be made available to COPFS and to defence lawyers. They should be able to gain access to all the data other than the identity of the judge who dealt with a particular case.
Chapter 29

SOCIAL ENQUIRY REPORTS

29.1 The main purpose of a Social Enquiry Report (SER) is to provide information to the court about the offender and their background circumstances, prior to sentencing. The report helps the court decide how to deal with the case. Reports can be requested by the court for any case, but must be requested before imposing a custodial sentence, either for the first time or if the offender is under 21 years of age. A court must also obtain an SER before making a community service or probation order. Reports should analyse offending, may contain assessments of the re-offending potential of the accused (and the harm which might be caused to others) in order that social work interventions can be appropriately planned and targeted. Assessments are supported by a structured risk assessment and will contain an intervention plan, where recommendations are made for social work disposals.

29.2 As noted above there are a number of circumstances in which the court is obliged to defer sentence in order to obtain a social enquiry report. Section 203(1) of the 1995 Act provides that:

“Where a person specified in section 27(1)(b)(i) to (vi) of the Social Work (Scotland) Act 1968 commits an offence, the court shall not dispose of the case without obtaining from the local authority in whose area the person resides a report as to —

(a) the circumstances of the offence; and
(b) the character of the offender, including his behaviour while under the supervision, or as the case may be subject to the order, so specified in relation to him.”

29.3 The 1968 Act lists those categories of individual where a report must be obtained, including:

- persons who, following on release, are required to be under supervision under any enactment or by the terms of an order or licence;
- persons subject to a community service order or probation order;
- persons who are subject to supervised attendance order;
- persons who are subject to a supervision and treatment order; and
- persons aged 16 and 17 years who are subject to a supervision requirement imposed in relation to the commission of any offence.
29.4 These provisions give rise to a number of instances in which the court is obliged to defer sentence for an SER to be conducted by officers of the relevant local authority. Whilst in a number of cases the preparation of such a report is quite appropriate (and provides the court with information necessary to determine the most appropriate disposal), throughout the review, and in discussion with organisations such as the Association of Directors of Social Work (ADSW) the Committee questioned whether there was always a need for a new SER to be produced in the circumstances currently required by legislation. For some minor matters obtaining an SER serves little purpose. If an offender who is subject to a community service order is convicted in the district court following a failed fiscal fine offer the only likely sentence may be a very modest fine. It is a waste of resources to require the preparation of an SER in such circumstances. If the court is satisfied that no useful purpose is likely to be served by obtaining one, we consider that it should not be required to defer sentence for that purpose. Such deferments are usually accompanied by an order that the offender appears in person, leading to possible loss of wages for him or her. In a number of cases “new” reports were felt to be unnecessary in view of the fact that the accused had been in court very recently and an SER had been produced for a previous appearance. In those instances the circumstances of the accused had often changed very little (if at all) since the last SER had been commissioned. The necessity of deferring such cases for SERs contributes further to delays in the system. In a number of cases judges and social workers felt they were just “going through the motions” and that a new report was not necessary. The Committee therefore recommends the removal of the compulsion to obtain a new SER prior to sentence in the circumstances currently prescribed, where an existing report on the offender has been prepared within the last 3 months. The option of obtaining a new report in these instances should, however, be retained – so that an application can be made to the sheriff for a new report where there have been significant changes in the circumstances of the accused.

29.5 The Committee considered the operation of “stand down” SERs – which take place in some English courts. A duty social worker would be on hand in the court in order to conduct an immediate interview with the offender and report back to the court – avoiding lengthy deferrals for sentence. Such reports can identify very quickly cases in which a full SER would be obtained and can indicate other assessments which should be made of the offender. It was noted that such arrangements operated most effectively when the social worker on hand had some knowledge of the offender’s background or was able to access such information quickly. Such a system would not be successful in all cases – for example when a case was heard in an area other than the offender’s normal area.
of residence, the local social work department would not have access to previous SERs or information relating to the accused. Basing a social worker in a court is common and may be a more effective use of resources in many courts. Such a social worker can and sometimes does give an oral report in cases. Such a report would be particularly useful where it appears to be unnecessary in circumstances such as those referred to above to obtain an SER in the usual way. The Committee noted the role played by stand-down reports in England and Wales and recognised that there may be merit in making more use of “stand down” reports in Scottish courts where a significant need for SERs existed.

29.6 The Committee noted that social workers would be better placed to provide accurate and meaningful SERs if they were provided with more information relating to the accused and the alleged offences he or she faced. In some cases at present the “account” the social worker hears from the offender at interview does not and could not match the charges faced by the individual in question. The social worker then needs to rely on a combination of that account of events plus his or her own experience to produce an SER that the court will find of benefit in determining the most appropriate disposal. The provision of a summary of the evidence to the social worker in advance of his or her interview with the accused would be of value – a short summary of the evidence (similar to that which would be provided to the accused with the charge) could be provided, along with a copy of the complaint and details of previous convictions (which social workers currently receive). The Committee recommends that these steps are taken – as they would allow social workers to produce their report from a more informed standpoint.

29.7 The Committee noted that, in common with other documents essential to the process of a case, the facility to send and authenticate SERs electronically, through ISCJ IS, would improve efficiency.
We recommend the removal of the compulsion upon the court to obtain a new Social Enquiry Report (SER) prior to sentence in the circumstances currently prescribed, where a report which has been produced in the last 3 months is available. The option of obtaining a new report in these circumstances should be retained.

We recommend that social workers be provided with a short summary of the evidence against an accused (similar to that which would be provided to the accused with the complaint) along with a copy of the complaint and details of the accused’s previous convictions to assist in the production of accurate SERs.

We recommend that it should not be necessary for a court to obtain a social enquiry report if the court is satisfied that, having regard to the sentence likely to be imposed by it, the obtaining of such a report would serve no useful purpose.
Chapter 30

COURT SITTING HOURS

30.1 It was suggested during the course of our consultations that we should consider the length of the court day with a view to extending it at either end or both. At present courts sit in public in most courts from 9.30 a.m. or 10 a.m. until 1 p.m. and from about 2 p.m. until business is completed. On most days in most courts business will be completed by at about 4.30 p.m., though there are regular exceptions to that in some places, notably Glasgow Sheriff Court when dealing with custody cases (see para 10.15 which discusses the issue of custody courts in more detail).

30.2 Between May and September 2002 the Lord Chancellor’s Department arranged for there to be two extended court sitting hours pilots: at Bow Street Magistrates’ Court in London and at Manchester City Magistrates’ Court. As part of the Manchester City Magistrates’ Court pilot three custody courts started at 9 a.m. to deal with overnight police custody cases involving adults. Some members of the Committee visited Manchester City Magistrates’ Court during that pilot. There were notices within the court building advising solicitors that they had to have seen their clients in custody prior to the court commencing at 9 a.m. The purpose of this pilot was to improve access to justice and reduce court delays. During the period of the pilot 534 defendants appeared between 9 a.m. and 10 a.m. out of an eligible total of 1,145 prisoners in custody who had been delivered to the court before 8 a.m. On average 24 defendants were dealt with on Mondays and 12 on other days. Most were dealt with for minor offences: theft, breach of the peace, failure to surrender to custody in accordance with the terms of their bail and breach of other bail conditions. In the pre-pilot period there were more cases of assault, burglary and driving while disqualified. 64% of those who appeared pleaded guilty and 60% were dealt with. It was thought that these rates were not significantly different from the rates prior to the pilot. The way the pilot was run suggested that the gains were not significant. Throughput was lower and the same number of morning courts spilled into the afternoon as before. The evaluation did not recommend the roll-out of that scheme to other courts.

30.3 In Manchester City Magistrates’ Court they also piloted evening courts. Two courts were made available to hear trials from 4 p.m. to 8 p.m. on Tuesdays and Thursdays. There was a restriction on trials which could be heard during those periods to cases which could not result in a custodial sentence (because of practical difficulties of dealing late in the day with those sentenced to or ordered
to be detained in custody). The court heard only a limited number of cases many of them not involving civilian witnesses. The objective of this pilot was to reduce delay and improve court services to victims and witnesses. In practice nine out of 10 cases which went to trial in evening courts were for motoring offences. The percentage of trials which did not go ahead on the day was broadly similar to that prior to the pilot although more trials were ineffective. It was possible to fix trial dates for evening courts for five weeks ahead instead of an average of 12 for normal trials but that may not have been sustainable. The court was unwilling to load the diary with large numbers of cases for that time of day. The evaluation of these schemes concluded that: “The pilot schemes were significantly more expensive than normal court business and did not represent value for money.”

30.4 The pilot at Bow Street Magistrates’ Court involved courts sitting from 6 p.m. until midnight on Fridays and Saturdays to deal with the first appearance of defendants who had been charged along with those who were appearing on warrant. Those who were remanded in custody had to be detained overnight in police custody rather than being sent to a prison. When the Bow Street pilot was being planned it was envisaged that the courts would be dealing with offenders charged with street crime. For defendants with mental health problems there were difficulties gaining out of hours access to information held by the Probation Service. The overall volume of work coming through these courts was low. On average nine to ten defendants appeared per session, which was significantly fewer than would appear before a typical day time court. It was found that the courts sat on average for one hour 37 minutes out of a possible 5 hours. Those who did appear appeared most often for theft, failure to surrender to custody in accordance with the terms of their bail and begging. The scheme had limited impact on dealing with public order offences because the cut-off time for the last arrests occurred before the peak arrest times for that type of offence. The courts had the effect that defendants were dealt with earlier than they otherwise would have been in that they did not have to remain in custody until Saturday or Monday morning. The Bow Street pilot was about three times as expensive per weighted case load as normal business, a significant proportion of the cost being required to cover secure transport to and from court, but staff costs were significant including premium payments for late or extended working hours. It was concluded that the pilot schemes as constituted did not offer value for money.

30.5 So far as summary criminal cases in Scotland are concerned, it is our impression, partly based on the very recent experience in England and Wales, that such pilots would require to be very clearly focused if they were to have any material chance of success. There would be no obvious advantage in extending
court hours in courts which are not under pressure. There is an obvious advantage in courts which are under pressure in making use of the court buildings for more hours in the day. However, these courts are staffed mainly by full-time staff who are already committed to a full working day. Either a second shift would have to be contemplated or existing staff would have to be remunerated appropriately for an extended day. In a court a lot of work goes on at times of the day when the court is not sitting. That work would still have to be done. There are limits to the number of hours those in court can concentrate sufficiently on the business in hand. A court sitting day of significantly more than 4½ to 5 hours if it were to happen regularly might not prove to be sustainable because after about that length of time the intense concentration required becomes rapidly more difficult. Solicitors, particularly those in smaller firms, have other work to do and need to be able to spend part of their working day in their offices. Procurators fiscal require preparation and reading time before appearing in court. We consider that, if there were to be regular extended hours in larger busier courts, it would be necessary to think more in terms of operating a second shift. It might be possible for the first shift to start at 9 a.m. and conclude about 2.30 or 3 p.m. and for another shift to start at about that time and continue into the evening. Having said that we are far from convinced that the advantages of such an arrangement would outweigh the disadvantages. It would be necessary to be clear what the purpose of that arrangement was and to evaluate carefully the costs of operating it. Many people in Scotland have their evening meal at a time which would coincide with court sittings. There may be transport problems for civilian witnesses who have to travel outwith normal working hours and some may have concerns about their safety in travelling to or from court in the evening. Expecting police officers to attend court as witnesses in the evenings, particularly at the weekends, could impose unacceptable demands on their resources. If courts are to be held late in the day there would be difficulties transporting offenders to prison and young offenders’ institutions because the Scottish Prison Service does not normally admit prisoners on a 24-hour-a-day basis. As the transfer of prisoners will become the responsibility of a contractor from the spring of 2004 onwards there might be no Scottish Prison Service staff on duty who were able to admit prisoners at a late hour in the evening.
We do not make any recommendation for the regular extension of court hours.

We recommend that courts should have responsibility for making the best use of the resources available to them. In doing so they should consider adjusting their hours of sitting to suit local circumstances. This is a matter which local criminal justice boards may wish to consider in more detail.
Chapter 31

SUMMARY APPEAL COURT

31.1 At present all appeals in summary cases from decisions taken in the sheriff court or the district court are made direct to the High Court of Justiciary. In the case of appeals against conviction, whether or not the appeal is also against sentence, and appeals against acquittal, appeal is by way of stated case. In the case of appeals against sentence only, appeal is by note of appeal setting out the grounds of appeal which is lodged with the clerk of the court from which the appeal is to be taken. In such cases the judge who sentenced the convicted person prepares a report for the High Court. There may be appeals by way of suspension or advocation and by way of a petition to the nobile officium.

31.2 Appeals against conviction or sentence or both, are with leave of the High Court in terms of sections 180 and 187 of the 1995 Act. The question whether leave should be granted or not is dealt with initially by a judge in chambers on the basis of the paperwork provided to him or her. The test is whether there are arguable grounds of appeal. If there are, leave to appeal will be granted. Where leave to appeal is refused the appellant may apply to the High Court for leave to appeal. Once again the matter is determined in chambers without the parties being present and the test remains the same. There is thus a two stage sifting process commonly referred to as the “first sift” and the “second sift”. This enables the High Court to dispose of appeals which appear to have no merit whatever without the necessity and expense of a hearing. Many appeals are marked but abandoned by appellants prior to a decision by the High Court. Of those in which leave to appeal has been considered, many are found to have no arguable grounds of appeal.

31.3 The Criminal Appeal Statistics, Scotland 2002 show that the total number of appeals completed in that year was 2,470 of which 452 were High Court appeals and 364 sheriff solemn appeals. There were 1,506 sheriff summary appeals and 148 appeals from the district court, i.e. 1,654 summary appeals. The figures for completed cases are not typical. They show a marked overall drop on the comparable figures for the preceding year, which was more typical of, though somewhat higher than, the average of the years preceding it. The figures for 2001 showed that the number of appeals completed was 3,568 of which 394 were High Court appeals, 539 sheriff solemn appeals, 2,391 sheriff summary appeals and 244 district court appeals, i.e. 2,635 summary appeals. Based on the figures for
previous years we consider that it is reasonable to estimate that about 2,450 summary criminal appeals should be completed in an average year.

31.4 The 2002 figures were distorted by a decision to give priority to solemn conviction appeals. That, combined with an increase in the number of appeals against conviction in High Court cases and other demands on court time, led to increased delays in dealing with other kinds of criminal appeals. The Criminal Appeal Statistics, Scotland 2002 record that between 2001 and 2002 the average duration of all completed appeals increased by 50% to 122 days and that there was a 153% increase in the average duration of summary conviction appeals to 316 days. These statistics also show that sheriff summary appeals took 91 days to complete (up 55%); that district and stipendiary magistrates’ court appeals took 102 days (up 37%); and that 41% of summary conviction appeals took a year or more to complete. The duration of summary sentence only appeals increased by 14% to 58 days. Solemn sentence only appeals had an average duration of 119 days, a 6% increase.

31.5 A comparison between the targets set for the disposal of criminal appeals and what was achieved shows that most targets were missed by a substantial margin.\(^70\) These figures confirm our view that if summary justice is to be truly summary, appeals should, in most cases, also be dealt with significantly more quickly than they are at present. We suggest that one way of assisting the High Court of Justiciary to achieve the targets which have been set for it without causing distortions elsewhere, would be for a new court to relieve it of much of the summary criminal appeal work which it currently undertakes.

31.6 As has been noted almost all appeals go through the sift process to determine whether there are arguable grounds of appeal. Taking overall figures for appeals in 2002, about 8% of appeals were abandoned before the first sift (5% in 2001), 31% were granted at first sift (25% in 2001), 17% refused at first sift with no further appeal (23% in 2001), 6% granted at second sift (10% in 2001) and 38% refused at second sift (37% in 2001). That implies that about 37% of the total number of appeals went to a hearing in 2002.

\(^70\) Scottish Court Service Annual Report 2002-2003.
31.7 The numbers of appeals against sentence which were found to be unarguable is substantial. In 2002, the numbers of appeals against sentence only were as follows:

![Table of appeals against sentence only](source: SEJD criminal appeals database)

31.8 The Committee has considered whether a summary criminal appeal court, at a level below the High Court, should be established with a view to relieving the High Court of the large numbers of appeals against sentence at least. We have discussed this proposal widely. There appears to be general support for it.

31.9 We envisage that, if a summary criminal appeal court were to be established, those who sit as judges of that court would be very experienced summary criminal judges. It does not appear to us to be necessary to employ the judges of the High Court to determine whether an appeal against sentence contains any arguable grounds of appeal and, if it does, to determine whether the sentence imposed is excessive. A summary criminal appeal court should be able to deal with such appeals more expeditiously than the High Court can currently do. The High Court has been overburdened with work continuously in recent years. The Committee considers that the speeding up of summary criminal justice should include speeding up the process of appeals which arise from summary criminal cases.

31.10 We would envisage that that court would have a panel of judges drawn from the shrieval bench. We envisage sheriffs principal being part-time members of the court. The burden of work, including the need to sift appeals, would be such that sheriffs principal on their own would be unlikely to be able to provide

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71 Table relates to 2002 calendar year.
72 This includes bills of suspension and petitions to the Nobile Officium.
73 Includes seven cases where the trial court was the stipendiary Magistrates court.
74 Includes cases where the trial court was the High Court or the Sheriff Solemn court.
sufficient judicial resources to deal with all of them, given their other responsibilities. We anticipate that a number of experienced sheriffs would be appointed as part-time members of the court for a term of years, possibly three years, which might be renewed. Such sheriffs should have held office as such for a minimum period of years, possibly five years, prior to their appointment as members of the summary criminal appeal court. We consider that there are advantages in having some turnover in the personnel of a summary criminal appeal court in order to broaden experience of its workings and to bring in new blood from time to time. We do not consider that the independence of the judiciary would be undermined by selecting some sheriffs to carry out these part-time functions for a limited period. We suggest that overall responsibility for the operation of the court should be in the hands of a single sheriff principal, who would be appointed to that role on a part time basis for a term of years, possibly three years, and that this appointment could rotate between sheriffs principal.

31.11 How sheriffs should be selected for appointment as members of the summary criminal appeal court is, we think, a matter which should be discussed further if this proposal is accepted. They might be appointed by the First Minister on the recommendation of the Judicial Appointments Board and after consulting the Lord Justice General (see section 11 of the Sheriff Courts (Scotland) Act 1907 and section 95(4) of the Scotland Act 1998). There may be an argument that their appointment should be the responsibility of Scottish Ministers in terms of section 14(4) of the Sheriff Courts (Scotland) Act 1971. Alternatively they might be appointed by the Lord Justice General. That is a matter which we do not consider it necessary for us to attempt to resolve.

31.12 So far as the nature of the work which the summary criminal appeal court should undertake is concerned, we are of opinion that all summary appeals against sentence only should be marked to that court. Provision would require to be made for the summary criminal appeal court at an early stage to be able to refer appeals which raised questions of law or of sentencing principle of wider application to the High Court of Justiciary. That is not to say that the summary criminal appeal court should not have power to determine points of law in the course of an appeal against sentence. On the contrary, it should have power to do so but there would require to be provision for a further appeal to the High Court of Justiciary on a point of law.

31.13 So far as appeals against conviction, against conviction and sentence or against acquittal are concerned, we are aware that many substantive points of law, including the law of evidence, have been determined over the years by the
High Court of Justice as the result of appeals by stated case from summary criminal courts. The focusing of the issues in a stated case frequently identifies issues which are unlikely to arise in an appeal following a conviction by a jury. Juries do not give reasons for their decisions. It appears to us that there are two alternative procedural approaches. One of these is that all of these appeals should be marked to the summary criminal appeal court with power to (or possibly an obligation on) that court to refer any cases in which points of law of importance appear to arise to the High Court of Justice. That would be done without an oral hearing in the summary criminal appeal court.

31.14 The alternative is for these appeals to be marked direct to the High Court of Justice with power to that court to refer them to the summary criminal appeal court where the points in issue do not justify a High Court hearing. Only about 13% of all summary appeals involve an appeal against conviction. Few are marked against acquittal. Some of these will not pass a sift or will be abandoned.

31.15 We favour the latter course, namely that all appeals involving conviction or acquittal should be marked to the High Court of Justice. It should be open to judges of the High Court carrying out a sift of such cases to direct that the case be dealt with by the summary criminal appeal court. We also take the view that appeals by the Crown against lenient sentences, and appeals by way of suspension or advocation should be marked to the High Court.

31.16 In essence then we recommend that the summary criminal appeal court be restricted to appeals against sentence, and to cases referred to it by the High Court. When hearing appeals against conviction or unduly lenient sentences referred to it by the High Court we recommend that the summary appeal court should sit as a bench of three. We consider that there should be a further appeal from the summary appeal court to the High Court of Justice either with leave of the court or on a point of law, but not as of right.

31.17 We have considered whether the proposed summary criminal appeal court should sit in Edinburgh, possibly in Parliament House, or should be peripatetic. If it were to be peripatetic we would envisage that it would sit within each sheriffdom in one or more court locations to which could be gathered a reasonable amount of business. We do not suggest that the summary appeal court should be required to travel to the original location of each case. However, we recognise that even hearing cases within each sheriffdom would represent a considerable improvement on the current position in terms of savings in the cost of representation of those who were convicted. They could be represented by
local solicitors in a relatively local court rather than being required to travel to Edinburgh, and to instruct Edinburgh agents and counsel.

31.18 The fact that the summary criminal appeal court sat locally should have an effect in increasing consistency of sentencing throughout Scotland. We would envisage that members of the summary criminal appeal court would sit in sheriffdoms of which they are not serving sheriffs or sheriffs principal to hear appeals. Judges of that court would require to have a commission which allowed them to sit anywhere in Scotland. They should be able to sift cases in whichever part of Scotland they happened to be and not be restricted to sifting them in the sheriffdom or sheriff court district in which the appeal arose. It is desirable that the sifting process should be carried out in the great majority of the cases which are appealed by a sheriff principal or sheriff who does not normally sit doing first instance criminal work in the court from which the appeal emanates. We would envisage that a summary criminal appeal court would make arrangements for its decisions on sentencing to be made available to other sentencers throughout Scotland, possibly by means of a sentencing information system maintained on an electronic database.

31.19 If there is a new summary appeal court we envisage a system of sifts in accordance with the present statutory framework, with the first sift being conducted by a single judge and the second sift by two. A judge who has refused leave to appeal at any stage in a particular case should not be involved in any later stages of that case. We consider that the summary criminal appeal court hearing sentence only appeals in which leave has been granted should sit as a bench of two. In the event of disagreement, a case where a point of importance arises or where the court is hearing a case referred to it by the High Court we consider it should sit as a bench of three. The summary criminal appeal court would be expected to hear and determine summary appeals promptly and efficiently. Part of its role should be to enhance sentencing consistency in summary criminal courts throughout Scotland.

31.20 We would anticipate that the legal aid costs of appeals would be less than they currently are, especially if the appeals were to be heard in the part of Scotland in which they arose. Judges of that court would only require to attend a court other than their home court for oral hearings of appeals. Sifting could be carried out in chambers as part of their ordinary working day. We would not anticipate that membership of the court would lead to any additional salary being paid. Membership would not entail a full-time commitment and should not do so. It is of advantage that the members of the court should have current, or at least
recent, experience of summary criminal cases. We would expect that it would be necessary to appoint someone, probably a sheriff principal, to be responsible for the operation of that court. It would be desirable to monitor the cost and efficiency of such a court. If such a court were to be established, baseline data for the costs of the present system and the time it takes the present system to process cases should be acquired as a basis for monitoring the effectiveness of the changed system.

**Legal Aid for Appeals**

31.21 The experience of many sheriffs and justices is that large numbers of summary appeals against sentence are marked which have no realistic prospect of success. We believe that the current arrangements concerning legal aid for appeals contribute to the numbers of cases in which appeals are marked. There is an initial grant of legal aid to cover advice on the prospects for an appeal. The current regulations do not enable the Scottish Legal Aid Board to consider whether the appeal has any merit in most cases. The expenditure of legal aid on such appeals is without effective scrutiny. Very often the sentence appealed against will be well within the range of sentences commonly imposed on such an offender for that type of case. The experience of sheriffs and justices is borne out by the sifting processes applied by the High Court of Justiciary, which refuses a high percentage of appeals which are considered to be unarguable.

31.22 We recommend that provision should be made for the Scottish Legal Aid Board (SLAB) to scrutinise the merits of summary appeals before legal aid is granted for them. That would require primary legislation. Such scrutiny would be likely to reduce the number of appeals which are marked and which are unarguable. That in turn would be likely to lead to savings for judges at first instance and on appeal, as well as for court staff.
We recommend that there should be a summary criminal appeal court.

We recommend that the summary appeal court should hear all summary appeals against sentence. Provision should be made for the summary criminal appeal court to refer any appeals which raised questions of law or of sentencing principle of wider application to the High Court of Justiciary.

We recommend that all appeals involving conviction or acquittal or lenient sentence should continue to be marked to the High Court of Justiciary. It should be open to judges of the High Court carrying out a sift of such cases to direct that the case be dealt with by the summary criminal appeal court.

We recommend that the summary criminal appeal court hearing sentence only appeals, in which leave has been granted, should sit as a bench of two but, in the event of disagreement or where a point of importance arises, should sit as a bench of three.

We recommend that the judges for the summary appeal court should be drawn from the shrieval bench. We envisage sheriffs principal being part-time members of the court. We also envisage that a number of experienced sheriffs would be appointed as part-time members of the court for a term of years, possibly three years, which might be renewed. Such sheriffs should have held office as such for a minimum period of years, possibly five years, prior to their appointment as members of the summary criminal appeal court.

We recommend that overall responsibility for the operation of the court should be in the hands of a single sheriff principal, who would be appointed to that role on a part time basis for a term of years, possibly three years, and that this appointment could rotate between sheriffs principal.

We recommend that the summary appeal court should be peripatetic. Appellants could be represented by their own solicitors in a relatively local court.

We recommend that provision should be made for the Scottish Legal Aid Board to scrutinise the merits of summary appeals before legal aid is granted for them.
Chapter 32

FINE ENFORCEMENT

32.1 Monetary penalties (fines and compensation orders) remain by far the most common disposal use in the criminal justice system, and in the summary courts in particular.

Persons with a charge proved, 1997-2001 - percentage use of various disposals

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<tbody>
<tr>
<td><strong>All Courts</strong></td>
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<tr>
<td>Custody</td>
<td>11</td>
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<td>13</td>
<td>13</td>
<td>14</td>
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<tr>
<td>Community sentences</td>
<td>8</td>
<td>9</td>
<td>10</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
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<td>69</td>
<td>66</td>
<td>66</td>
<td>64</td>
</tr>
<tr>
<td>Other sentences</td>
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<td>11</td>
<td>11</td>
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<td>11</td>
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<tr>
<td><strong>Solemn Courts</strong></td>
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<tr>
<td>Custody</td>
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<td>72</td>
<td>70</td>
<td>70</td>
<td>71</td>
</tr>
<tr>
<td>Community sentences</td>
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<td>22</td>
<td>22</td>
</tr>
<tr>
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<td>5</td>
<td>4</td>
<td>4</td>
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<tr>
<td>Other sentences</td>
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<tr>
<td><strong>Summary Courts</strong></td>
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<tr>
<td>Custody</td>
<td>9</td>
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<td>11</td>
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<tr>
<td>Community sentences</td>
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<td>11</td>
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</tbody>
</table>

32.2 Going down a further level, the pattern of sentencing in the sheriff summary court is (unsurprisingly) quite different from that in the district court.

75 Source: Costs, Sentencing Profiles and the Scottish Criminal Justice System, 2001 (Scottish Executive).
76 Includes court type not known.
77 Includes probation and community service.
78 Includes fines and compensation orders.
79 Mainly admonition.
32.3 In 2001 54% of sheriff summary cases ended in a fine. The average fine was £277, though the average varied very much across the country. The equivalent figure for 2001 in relation to the district courts (excluding the stipendiary magistrate courts) showed that 87% of those sentenced were fined, with an average fine of £98. The variations in fine levels were much less marked in district courts across Scotland.

32.4 Compensation orders were used much less frequently (4% of sheriff summary cases, 7% of lay district court cases) sometimes in conjunction with fines.

32.5 In addition to the courts a number of other organisations have the authority to impose financial penalties upon an individual in certain circumstances – e.g. an accused may accept the offer of a fiscal fine as an alternative to prosecution, and police and local authorities can issue fixed penalty notices in relation to offences such as littering and to deal with parking fines which are unpaid in the first instance. In considering future arrangements relating to the enforcement of fines the Committee did not wish to restrict itself to those fines imposed by the courts. We are aware that throughout the United Kingdom and in many parts of the Commonwealth there has been a very substantial and continuing rise in the numbers of infringements which are dealt with by fixed penalties or the equivalent. These have the potential to present a larger enforcement problem than court imposed fines. A number of the recommendations made later in this chapter therefore apply both to court fines and other financial penalties. Research on offenders’ views commissioned by the Committee explored issues such as why offenders did not pay fines and what measures (in the view of offenders) could be introduced to improve payment rates. Those findings were also taken into consideration by the Committee in reaching its recommendations.

### Sentencing in the summary courts, 2001

<table>
<thead>
<tr>
<th>Court</th>
<th>Percentage custody</th>
<th>Percentage community service</th>
<th>Percentage probation</th>
<th>Percentage fined</th>
<th>Percentage admonished/other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sheriff summary</td>
<td>17</td>
<td>6</td>
<td>10</td>
<td>54</td>
<td>13</td>
</tr>
<tr>
<td>Stipendiary magistrate</td>
<td>20</td>
<td>0</td>
<td>3</td>
<td>66</td>
<td>10</td>
</tr>
<tr>
<td>Lay district</td>
<td>1</td>
<td>N/A</td>
<td>1</td>
<td>87</td>
<td>11</td>
</tr>
</tbody>
</table>

Note 75, supra.

32.6 The Committee recognised the importance of maintaining the fine as a credible, enforceable penalty in a summary justice system. The benefits of the penalty are that it is:

- flexible - capable of being tailored to the seriousness of the offence and the means of the offender;
- cheap to administer;
- does not normally disrupt the life of the offender; and
- on available evidence, has the lowest reconviction rate of any penalty imposed by the courts.

32.7 On that last point, the Committee noted the evidence on reconviction contained in the recent Scottish Executive Statistical Bulletin Reconviction of offenders discharged from custody or given non-custodial sentences in 1997, Scotland. This showed reconviction rates within 2 years for offenders sentenced in 1998 to be as follows.

<table>
<thead>
<tr>
<th>Offenders sentenced in 1998 - Percentage reconvicted within 2 years (provisional data)</th>
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<tbody>
<tr>
<td>Custodial sentence</td>
</tr>
<tr>
<td>Probation</td>
</tr>
<tr>
<td>Community service</td>
</tr>
<tr>
<td>Monetary penalty (fine and/or compensation order)</td>
</tr>
</tbody>
</table>

32.8 We recognised the caveat that these differences were less marked once the age, sex and number of previous convictions of offenders were taken into account. We also recognised that many fines are given for regulatory offences. Nonetheless, given the current focus on reduction of re-offending, we suggest that making fines more effective and more workable would repay the effort made.

32.9 The Committee also noted that the use of the fine in the summary court has continued and continues to decline as a proportion of total disposals. We noted from the figures above that in the summary courts the reduction in the use of fines has been offset by an increase in the use of community sentences, but also by an increase over time in the proportion of cases attracting custodial sentences.

82 March 2003.
32.10 It is obviously difficult to establish with precision the balance of factors which have influenced the decline in the use of monetary penalties in the summary courts. Increased use of fiscal fines and police fixed penalties is likely to have reduced the numbers of court cases in which a fine was likely. Anecdotal evidence, however, suggested there has also been a mixture of positive factors – the availability of a wider range of community disposals, reflected in the significant increase in their use – and negative factors relating to enforcement difficulties. The Committee considered that if fines enforcement could be made more effective, sentencers would be more likely to choose a fine rather than a short custodial sentence. If the use of fines were to increase, the cost of enforcing relatively more expensive alternatives would be likely to decrease. More importantly, making even a small reduction in the prison population – given the lack of positive evidence that short sentences work – would be of wider benefit in Scotland.

32.11 The Committee therefore spent some considerable time looking at fine enforcement issues. We recognised that the Sentencing Commission has been invited to consider broad issues relating to fines – for example, the relationship between fines and the ability to pay and the balance between fines and compensation. This Committee has therefore focused its principal attention on the issue of effective enforcement of fines.

Present Arrangements for Fine Enforcement

32.12 When the court imposes a fine, the sentencer has the power to set the alternative at the time of sentence – which means that the court may set the term of imprisonment which will be served if the fine is not paid, and the offender will be automatically imprisoned in the event of default, e.g. if the fine is not paid within a specified time or instalments are not paid. There are no central statistics on the proportion of fines imposed with an immediate alternative, but anecdotally we understand it to be very small. Sentencers are unwilling to impose immediate alternatives when circumstances may change resulting in the offender no longer being able to pay the fine as ordered by the court.

32.13 In recent years a number of attempts have been made to support fine recovery by increasing payment flexibility and making use of dedicated fines enforcement officers. The use of the latter is limited by current legislative constraints – changes to primary legislation are required to give fines enforcement officers flexibility to change payment arrangements in response to changing
circumstances. Increasing the range of payment methods has some value and the survey of offenders indicated that following options might be considered:

- the use of debit and credit cards;
- online payment;
- payment at local authority outlets;
- payment outlets, such as the Post Office and the Pay Point scheme operated at local retail shops; and
- early payment discount.

32.14 That said, these additional methods of payment will do little to improve collection from those who are unwilling or unable to pay (or both).

32.15 In most cases, where default occurs and an alternative has not been set, the court’s initial response is normally to issue a warning letter. If that produces no response the defaulter will be cited to a means enquiry court (MEC) though few of those cited actually attend, leading to a warrant being issued for their arrest. Where the fine is not paid at or before the MEC the sheriff/justice of the peace has a range of options. The payment plan may be changed or more time to pay may be given. Research from the 1990s suggested that up to 1 in 5 of those attending MECs in the district court were given more time to pay. Anecdotal evidence suggests that of those who attend in person at sheriff courts a higher percentage than that are given time to pay though an alternative period of detention or imprisonment is likely to be imposed, to become operative if there is further default.

32.16 The judge can make a Supervised Attendance Order (SAO) which substitutes a period of constructive activity supervised by Criminal Justice Social Work for the unpaid fine. This may include social education, help with financial management and/ or an element of community service. SAOs were first introduced in Scotland on a pilot basis in 1992, and rolled out nationally from the mid 1990s onwards. They run for between 10 and 100 hours as ordered by the courts. The number of hours ordered will be a multiple of 10 related to the amount of the fine outstanding. A total of 2,700 SAOs were made in relation to 2,327 offenders in 2002-3. In the same year 1,709 SAOs came to an end, of which 1,250 (73%) were successfully completed and 272 revoked for breach. An initial

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83 See section 36 and Schedule 3 of the English Courts Act 2003 for an example of a legislative framework empowering fines officers with powers to alter payment arrangements and time to pay.
84 Survey of Offenders, supra, p31-32.
evaluation of SAOs published in 2001 suggested that within a relatively short period of time, SAOs had become established as a credible and effective option for dealing with fine default.

32.17 Following changes to legislation contained in the Criminal Justice (Scotland) Act 2003, the Executive is piloting two new SAO schemes. The first provides SAOs as a first instance disposal for all age groups. This means an SAO can be imposed on an offender without the need for a fine to have been imposed first. The second introduces mandatory use of SAOs in two prescribed courts for minor fine defaulters (fines not exceeding level 2, i.e. £500). This will, in practice, remove the option of custody for minor fine defaulters from those courts though custody will still be competent for breach of the SAO.

32.18 The ultimate sanction for failure to pay a fine is imprisonment. Although the numbers imprisoned for fine default are declining, they remain substantial in terms of prison receptions. They account for a tiny proportion of the average daily population because the length of time served is very short.

Number of entries into prison purely for fine default by sentence length imposed, 2002

<table>
<thead>
<tr>
<th></th>
<th>Adult</th>
<th></th>
<th></th>
<th>Young Offender</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Female</td>
<td></td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>Less than 7 days</td>
<td>444</td>
<td>65</td>
<td>59</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>7 days</td>
<td>1,240</td>
<td>160</td>
<td>126</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>8-13 days</td>
<td>559</td>
<td>44</td>
<td>77</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>14 days</td>
<td>830</td>
<td>75</td>
<td>89</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>15-29 days</td>
<td>286</td>
<td>17</td>
<td>36</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>30 days/1 month</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>31-59 days</td>
<td>52</td>
<td>5</td>
<td>5</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>60 days/2 months</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>over 60 days</td>
<td>9</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>3,428</td>
<td>368</td>
<td>392</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>(2001 Total)</td>
<td>3,578</td>
<td>354</td>
<td>421</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>(2000 Total)</td>
<td>3,687</td>
<td>363</td>
<td>406</td>
<td>28</td>
<td></td>
</tr>
</tbody>
</table>

### Average daily population of fine defaulters, 1997 - 2002

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Adult</td>
<td>83</td>
<td>65</td>
<td>51</td>
<td>52</td>
<td>53</td>
<td>53</td>
</tr>
<tr>
<td>Young offenders</td>
<td>19</td>
<td>10</td>
<td>8</td>
<td>9</td>
<td>9</td>
<td>8</td>
</tr>
<tr>
<td>Total</td>
<td>102</td>
<td>75</td>
<td>59</td>
<td>61</td>
<td>62</td>
<td>61</td>
</tr>
</tbody>
</table>

32.19 On occasion, means enquiry courts simply remit fines. Figures held centrally suggest that in 2000-1 sheriff courts in Scotland remitted 1,691 fines (2.1% of the fines imposed, to a total value of £455,604): in the same year, the district courts remitted 1457 (1.8% of the fines imposed) in full and 695 (0.8% of the fines imposed) in part. Fines remitted totals will include fines remitted because the person fined has died. The value of district court fines remitted is not held centrally. The sheriff courts imposed 79,000 fines in 2001-2: the district courts handled a total of 83,000 fines in the same year, including 41,000 court fines and 36,000 registered fines.

32.20 It is also open to courts to order an arrestment of earnings or to request direct deductions from Income Support/Jobseekers allowance as a way of securing repayment. Figures demonstrate that these options are very little used: in the latest year for which figures are available (2001-2) only 47 sheriff court fines were marked for the deduction of income support and 981 district court fines resulted in income support being deducted. The Committee’s experience suggests that the infrequent use of deduction from benefit reflects criticisms made by justices of the peace and sheriffs of the complexity of the application procedure, the limitations placed on the amount of benefit that can be deducted (typically in the region of £2.70 per week) and the fact that their application is accorded a lower priority than other direct deductions. Other disadvantages identified to the Committee were that if the offender ceases to be entitled to the benefit subject to the deductions order but transfers to a different kind of benefit, the deduction order ceases and does not attach to the new benefit; and that courts receive information relatively infrequently as to the amount deducted in particular cases.

32.21 We understand that deductions for debts in relation to housing costs, fuel charges, water charges and council tax take higher priority than court fines, and

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that it is possible for a deduction in place for a court fine to be suspended where the claimant’s resources are assessed as inadequate or a higher priority deduction is received.87

32.22 The Committee has been unable to obtain figures for the number of fines recovered through arrestment of earnings, but discussions with stakeholders suggest the number is extremely small. An unpublished paper for the Scottish Office prepared some time ago (1989) reported that attachment of earnings orders were not widely used mainly because 90% of offenders imprisoned for fine default were unemployed, but also because offenders did not wish their employers to know that they had offended. Where arrestment of earnings is a possibility, therefore, employed offenders are perhaps more likely to pay. Fines may be recovered by civil diligence prior to the commencement of a sentence of imprisonment or detention for non-payment but in practice very few attempts are made to recover court imposed fines by this method – except in cases in which the offender is a company or other corporate body.88 In spite of the current administrative difficulties associated with earnings arrestments and deductions from benefits it should be noted that 71% of offenders interviewed in the survey of offenders believed that these would be an effective way of recovering fines from those who might otherwise default.89

Evaluation: Current Strengths and Weaknesses of Fines Enforcement Systems

32.23 One of the weaknesses of the existing enforcement system is that at present each local authority and the Scottish Court Service operate their own collection and enforcement policies, although all use the basic “building blocks” identified above. This results in widely varying methods of payment and enforcement nationally. There are different ways to pay in different district courts. In some Commission areas it is possible to pay district court fines at local authority offices throughout the area. Sheriff court fines have to be paid at the court which imposed them or, where a fine has been transferred, to the court to which it has been transferred. The procedures for enforcement of fines by district courts vary from area to area. For example, some areas issue warning letters in the event of initial default while others immediately issue a citation to a means enquiry court. It is not possible for a fine to be transferred between sheriff and district courts for

87 See the Fines (Deductions from Income Support) Regulations 1992, in particular section 4(1)(b) which details the priorities that outranked a fine. Section 10 deals with the review of such orders.
88 Renton and Brown, supra, 23-57.
89 Survey of Offenders, supra, p35 and table 9.7.
payment. Similarly, offenders required to pay fines to district courts can currently only pay their fine in the Commission area in which the relevant district court is situated, unless the fine has been transferred to another district court in which case it must be paid there. Individual offenders may have outstanding fines in two or more courts and may be subjected to different enforcement regimes in different courts or in different levels of court. These regimes may be mutually inconsistent or beyond the defaulter’s ability to comply with.

32.24 The Committee therefore considers that any proposal to improve fines enforcement should promote greater consistency and flexibility across Scotland.

32.25 Another obvious difficulty in the current system is the extent to which police officers are tied up executing means enquiry warrants for the arrest of individuals who fail to attend court in respect of unpaid fines. The background to this problem is that large numbers of fines are not paid within the time required or instalments are not paid on time. When that happens the enforcement process (detailed at paragraph 32.15, above) kicks into action. Warrants for the arrest of those who fail to attend means enquiry courts and warrants to imprison following fine default are passed to the police for enforcement.

32.26 Attendance at means courts is low almost everywhere and the percentage of warrants issued for non-appearance at such courts is high. The Committee noted the number of outstanding warrants in connection with fine recovery – in Strathclyde alone the figure in December 2003 was over 21,000. From the police point of view the resources involved in executing warrants are substantial. From an exercise conducted during 2001 Lothian and Borders Police found that, on average, it took somewhat more than two attempts to execute warrants, but that in some cases up to 10 attempts were required, as when difficulty was encountered in tracing the fine defaulter. The average fine outstanding at that stage in Lothian and Borders was around £190.

32.27 The Committee notes that, because police forces regard enforcement of fines as an inefficient use of their resources, they do not give fine enforcement high priority. We were told that many of the warrants which were executed were executed because a police officer encountered a person in the course of some other investigation for whom there was an outstanding warrant.

32.28 The Committee has concluded that fine enforcement procedure should be redesigned in a way which frees up police officers for duties of higher priority. If a more effective procedure can be devised which does not require continuing
involvement of the courts in the enforcement of fines there would be savings in court time and in the resources of the Scottish Court Service if they were to be relieved of that responsibility. Similar considerations would apply if police could be relieved of their current role in the collection and enforcement of fines.

32.29 The Committee also looked carefully at imprisonment for fine default. In England and Wales imprisonment for non-payment of fines is now exceptionally rare as the result of court decisions to the effect that imprisonment should only be imposed if all other possible alternatives have been tried and have failed. Because of the widely held view that those who have been fined should not be imprisoned unless this is unavoidable, courts in Scotland are reluctant to impose sentences of imprisonment for non-payment unless there really is no alternative. Knowledge by offenders that this is the approach of the court leads a fair number of them to delay payment until the point is reached when they have the alternative of being taken to prison there and then. Getting to that point will have required the expenditure of considerable resources within the courts system and by the police. This is not a satisfactory situation. If, on the other hand, the courts adopted a policy of imposing imprisonment immediately in almost every case of default a substantial improvement in payment rates would be likely but the number of admissions to prison for non-payment would also rise substantially, with considerable resource implications, especially for the Scottish Prison Service.

32.30 Nor was the Committee convinced that the current provisions for imprisonment for fine default are an effective use of resources. At present someone sentenced to a fine not exceeding £200 – the vast majority of fines – serves 7 days imprisonment as an alternative. In terms of section 5 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, a person who is a short-term prisoner – that is, one serving a sentence of less than 4 years – will be released unconditionally after serving half his or her sentence. That provision applies to fine defaulters as it does to those sentenced to imprisonment. In terms of section 27(7) of that Act, a prisoner who is due to be released on a Saturday, Sunday or public holiday must be released on or by the last preceding day which is not a Saturday, Sunday or public holiday. So if a person is due to be released on a Monday holiday he or she will have to be released on the previous Friday. A 7-day alternative period of imprisonment may be wholly ineffective. The fine will not be paid. No alternative will, in effect, have been served. The fact is well known to fine defaulters, some of whom take advantage of the situation.

32.31 The Committee therefore supports the existing and proposed future uses of SAOs both as an alternative to prison for those who have defaulted and as a first
disposal. Recognising that there are many people for whom payment of even a small fine is very onerous, it particularly commends the use of SAOs as a first disposal where a realistic assessment of an offender’s means suggest that a fine imposed will simply not be paid. An SAO as an alternative to imprisonment where the person fined cannot pay has the potential to be successful in avoiding many admissions to prison for non-payment, but not all fine defaulters are willing and able to comply with an SAO. The Committee notes the piloting of such orders as a sanction to the exclusion of imprisonment in two courts.

32.32 More broadly, the Committee considers that the present arrangements for the enforcement of court imposed fines are not ones which can or should continue into the future. The enforcement system as it is at present, while successful in collecting and accounting for payments which are made, fails to secure prompt payment of sums which those fined are unwilling to pay and does not cope well with those who genuinely cannot pay. The procedures themselves sometimes frustrate collection (e.g. the situation whereby an accused need only pay the first instalment of a fiscal fine to escape prosecution as the mechanism for extracting subsequent payment – knowing that the alternative (civil diligence) is rarely used in practice. This is discussed in more detail from paragraph 11.18). Responsibility for enforcement is largely in the hands of the police. We do not consider that they should continue to be required to call at the doorstep of fine defaulters in the hope that some or all of the outstanding fine will be recovered or that they will be able to arrest a fine defaulter. The costs of recovering such sums which the present system requires to be incurred, although difficult to quantify because figures are not kept separately for enforcement activity, will exceed the amount recovered in many cases.

The Committee recognises the importance of maintaining the fine as a credible, enforceable penalty in a summary justice system. It considers that any proposal to improve fines enforcement should promote greater consistency and flexibility across Scotland. More broadly, the Committee considers that the present arrangements for the enforcement of court imposed fines are not ones which can or should continue into the future.

The Committee recommends a different approach to fines enforcement, which is:

- consistent and flexible across Scotland;
- applies equally to compensation orders, court imposed fines, fiscal fines,
fixed penalty notices and other financial sanctions for breaches of the criminal law;

• makes it easy to pay for those who are willing to pay;
• minimises or eliminates the involvement of courts and the police once the initial fine or other sanction has been imposed;
• ensures that all an offender’s outstanding fines which are in default are dealt with by a single enforcement process;
• eliminates direct imprisonment for fine default (in this respect the Committee supports the existing and proposed future uses of SAOs);
• provides clear and graduated sanctions for non-payment; and
• reduces or eliminates the cost to public funds of the enforcement process.

Key Elements of a New Fine Enforcement System

32.33 Perhaps the most significant change to improve collection arrangements would be the unification of the summary courts administration. This would eliminate the variations in practice identified above and create a more consistent approach to fines across Scotland. All outstanding fines for each offender could be brought together and enforced by a single process but that in itself would only go part of the way to improving the effectiveness of the system. There are prior and subsequent steps to be considered.

Stage 1: Imposition of the Fine

32.34 The Committee notes the provisions included in the Courts Act 2003 for England and Wales which seek to ensure that the court sentencing an offender has the best available information about their means. All defendants will be required to provide information about their means to the court prior to sentencing, usually by completing a means enquiry form. Failure to provide such information constitutes an offence. Failure to provide the information also entitles the court to assume that the offender has adequate resources and to fine accordingly.\(^90\) If the level of income is later disclosed, it would be for the court to consider and possibly to re-sentence.

\(^90\) Section 95 of the Courts Act 2003, which amends s128(5) of the Powers of Criminal Courts (Sentencing) Act 2000.
32.35 Targeting fines more precisely on the basis of better information about means should in itself help to reduce the likelihood of default because the fine is set at the wrong level for the offender’s income. As noted above, it would also help to identify those for whom an SAO was the optimal first disposal.

Stage 2 - Enforcing the Fine

32.36 In the Committee’s research on enforcement systems, it is clear that in a number of different jurisdictions an attempt is being made to minimise the involvement of the courts in enforcement. The escalation in the numbers of fixed penalties in these jurisdictions and the need to collect and enforce them effectively is a major contributor to this change of emphasis.

32.37 A common feature of all those approaches is to shift the balance between what has to be done by the court and what can be done by administrative officers who are given additional enforcement powers.

32.38 For example, radical changes to the English system are contained in the new Courts Act (which received Royal Assent on 20 November 2003). Under these proposals, administrative staff will be given powers to manage the collection and enforcement function and reduce the need for expensive court hearings. But the English scheme does not entirely eliminate court involvement – for example, a defaulter will be able to appeal against a discretionary decision of a fines officer and will be entitled to have that appeal heard by a magistrates’ court. And certain sanctions will only be available with court consent – for example, fines officers will need court consent to sell a defaulter’s vehicle after it has been subject to a clamping order as an earlier enforcement penalty. And it will still be for the court, not the fines officer, to decide whether to remit the fine or (at the other end of the spectrum) to send a persistent defaulter to prison.

32.39 We understand that in the context of the new unified courts administration in England the new fines collection procedures will be managed by staff of the court, but that there will be an element of restructuring to ensure that every court

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91 See, in general, section 36 of the Courts Act which establishes fine officers and Schedule 3 which outlines the collection of fines by fine officers and the powers that they have.
92 Schedule 3, para 8.
93 Schedule 3, para 16.
94 In circumstances where a disposal of this nature is required the fines officer is empowered to refer the case back to the magistrates’ court by virtue of Schedule 3, para 17.
has an individual responsible for overall policy and performance on fine enforcement within that court.

32.40 A more radical approach is that of the State Debt Recovery Office (SDRO) in New South Wales. Briefly, since January 1998 the collection of unpaid fines in New South Wales has been dealt with entirely by the SDRO: unpaid fines are referred by the court to the new office and thereafter it imposes a series of graduated sanctions for non-payment, including additional charges. The distinguishing feature of this system is that there is no court involvement. If these sanctions fail, the SDRO has power to impose a community service order where a fine and additional charges are not paid. Where community service is not completed satisfactorily, the Probation Service provides a breach report for the SDRO, who then issue a notice to the fine defaulter seeking an explanation. If no satisfactory explanation is given within 28 days, it is again the SDRO which can issue a direct warrant authorising imprisonment without further direct court intervention. Up to April 2003 (when members of the Committee visited the SDRO) no one had been imprisoned in New South Wales under these arrangements. The SDROs costs are more than fully recovered from the additional charges it imposes.

32.41 The Committee is clear that a new approach to fines enforcement is required, which minimises the involvement of courts and the police and provides flexible powers to administrative officers to carry out many of the current enforcement tasks. It is also clear that imprisonment for fine default while no doubt a useful threat has failed in the past. It required substantial resources to be devoted to taking more than 4,200 defaulters to prison per annum where they must be admitted by Scottish Prison Service, only to be released a short time later. Imprisonment and detention should remain available for those required to carry out a community sentence (for example, an SAO) in lieu of payment of a fine, but only for breach of the order imposing a community sentence.

32.42 The Committee looked carefully at the possible models for “civilianising” the process of collecting and enforcing financial penalties, including that being implemented in England, and the more radical approach adopted in New South Wales.
32.43 It recommends that the Executive should bring together responsibility for the recovery of financial penalties within a single delivery organisation. This could be a separate arm of the Scottish Court Service or a free standing public sector organisation. The key features, and arguments in favour, of such an organisation would be:

i. fines enforcement across the country could be managed centrally (with access to call centre facilities). This would offer lower overheads and staff costs;

ii. the organisation would have a simple, single mission – the collection and enforcement of financial penalties being its top priority;

iii. it would quickly build up expertise in the field, and would gain experience in deducting benefits/effecting wages arrestment – useful methods of collection that are currently under-utilised;

iv. it could tailor what it does to circumstances of particular offenders, and would be well placed to offer new methods of payment;

v. performance would be monitorable – offering scope for considerable improvement on current arrangements for managing and improving collection and enforcement;

vi. it could collect all outstanding fines, fiscal fines and compensation orders, FPNs and – if required – any other outstanding sanctions imposed by the state or local authorities as a single enforcement process;

vii. the organisation could be wholly or partially self-funding – imposing additional charges on top of the original penalty when it is not paid on time – thus reducing or eliminating the cost to the taxpayer;

viii. it could free-up the resources that are currently (and less effectively) used in fines enforcement – the police and the courts;

ix. a single organisation could make optimum use of a consistent dedicated IT system;

x. the organisation could be innovative – continually seeking more effective ways to enforce fines and improve collection rates.
In relation to the organisational structure for fines enforcement, issues which the Executive would need to consider include:

i. whether initial collection of fines, fiscal penalties and the like should also be transferred to the agency, or whether it should deal only with those which are in default;

ii. economies of scale: co-location with an existing organisation might be preferable. Staff numbers would not be large, particularly if optimal use is made of IT and a call centre function formed part of the service, and might not justify the creation of separate “head office” functions;

iii. whether the organisation should have a single office; and

iv. how rationalisation of fine enforcement could be made to work most effectively in the context of the unified summary court.

On the first point, the Committee’s view is that in most cases the new body should have responsibility for collection and enforcement of fines from the point at which they are imposed by the court (in relation to court fines) or by the police/procurator fiscal (in terms of fiscal fines and fixed penalty notices). Further thought should be given to the collection of parking fines (where the process has not been decriminalised) but the Committee’s overall view is that wherever practicable financial penalties which carry an ultimate criminal sanction should be collected and enforced by the new agency.

In terms of the process of enforcement: key considerations will be:

i. the powers given to staff in the new enforcement structure;

ii. whether there are any sanctions which only a court should be allowed to apply, e.g. a supervised attendance order, an electronic tagging order, a curfew or imprisonment for breach of a supervised attendance order;

iii. the appropriate steps to follow non-payment, which could include:

1. late payment/fine enforcement surcharge (and we note the Anti-Social Behaviour Bill proposal that unpaid fixed penalty notices which become a registered fine would attract a 50% surcharge);
2. procedures for the arrestment of wages and deductions from benefits;

3. loss of entitlements – for example, disqualification from driving until the fine is paid, vehicle clamping, or suspension of road tax;

4. seizure or prohibition of disposal of valuable assets: land, houses, rights to inheritances, windfalls;

5. requirement of defaulters to appear to be examined by the organisation as to income, assets and liabilities with sanctions for failure to appear;

6. the imposition by the organisation of a Supervised Attendance Order, with a tariff of a number of hours related to the amount due;

7. registration of fines in default in an appropriate existing (or new) register – affecting the defaulter’s ability to obtain credit; and as a final resort:

8. possibility of detention or imprisonment for breach of supervised attendance order (only);

iv. circumstances in which loss of entitlements should not be applicable for example, disqualification from driving of handicapped drivers;

v. what avenues of appeal, if any, would be required against any sanctions imposed by the organisation and in what circumstances;

vi. criteria which the organisation should apply to writing-off unrecoverable sums due, e.g. as a result of death, long-term illness, untraceable offender; and

vii. the extent to which surcharges for late payment and enforcement should enable the new enforcement system to be cost neutral or achieve a surplus year on year.

32.47 Some of these enforcement options were considered in more detail. The Committee considered whether the alternative approach of deductions from
benefit/arrestment of earnings could be made more effective, given the remarkably low level of use at present of deductions from benefit which appears, prima facie, to be a useful measure. Deductions from benefit are of course a reserved issue, but the Committee has been made aware of recent changes in the English Courts Act 2003 which make deductions from benefit for fine default possible without recourse to a court in certain cases. On the first occasion that an offender defaults the fine will be increased.\(^95\) If the offender does not respond to that increase the fines officer can notify the offender of further steps he or she intends to take in order to elicit payment\(^96\) which may include an attachment of earnings or deduction from benefit.\(^97\) If the offender does not exercise his or her right of appeal to the magistrates’ court within the specified time limit of 10 working days the further sanctions set out in the notification letter may be applied by the fines officer without recourse to the court.\(^98\) We understand, however, that these changes do not affect the core features of deduction from benefits which make it unattractive to sentencers – the small size of weekly deductions and the fact that fines are still well down the priority list of deductions.\(^99\)

32.48 Recognising that the issue of deduction from benefits is reserved, the Committee recommends that the Executive should explore with the Department of Work and Pensions the options for making the deduction from benefits scheme operate more effectively in Scotland. While, however, deductions for payment of outstanding fines remain a very low priority against other deductions from benefit, and the payment instalments remain very small, the Committee is not convinced that this option will be so attractive as of itself to solve the problems of fine enforcement in Scotland.

32.49 Similarly, the Committee recommends that the Executive should consider how arrestment of earnings orders might be better used as a means of fine enforcement. They are in relatively common use as an enforcement measure in relation to some civil judgments. It recognises, however, that the role of these sanctions may be limited, simply because non-payment is concentrated among those who are unemployed. But the threat of arrestment of earnings for non-payment of fines may be very effective for fine defaulters who are in employment.

\(^{95}\) Courts Act 2003, Schedule 3, Para 9.
\(^{96}\) Para 12.
\(^{97}\) Para 13.
\(^{98}\) Para 15.
\(^{99}\) See Paras 33.20 – 33.22.
Unit Fines

32.50 The Committee has given consideration to the introduction of a day or unit fines system in Scotland. Such systems closely match the size of a fine to the ability of the offender to pay, such that a wealthy person will pay more, sometimes very much more, than someone on a limited income for the same offence. This has the effect of the punishment weighing proportionately as heavily on all offenders, thereby achieving greater fairness and equality, openness and public acceptability into the sentencing process. Unit fine systems are common and standard in many jurisdictions across the world, notably in Commonwealth countries such as Australia, New Zealand and Canada, but also in the United States and Europe. In Europe the system has operated since 1921 in Finland but is also applied in Germany, Austria, Hungary, France, Portugal, Switzerland and Poland, and all of Scandinavia. In the British Isles, England and Wales experimented with the system and decided not to pursue it, while Ireland decided not to introduce it, largely because of the English and Welsh experience. The English and Welsh trial in 1992 was deemed not to be a success and after six months the Home Office discontinued it. This appears mainly to have been because of difficulties in assessing the incomes of offenders and due to the opposition of magistrates to the fettering of their freedom to impose the size of penalty they wished. The Committee considers that it would be unfortunate if the short and inadequate trial in England and Wales, as compared to the extensive and successful use of the system across the world, should lead to the refusal to examine the relevance of the approach for Scotland. Thus, whilst acknowledging that there are serious practical issues to be considered in the operation of a unit fines system, the Committee recommends that a thorough examination of the system should be undertaken in the context of the revised approach to summary justice in Scotland proposed by the Committee.

Conclusion

32.51 The Committee recognises that there are no simple solutions to the difficulty of fine enforcement. It can be made easier, for those who want to pay, in ways which are convenient to them. It can be made easier for the court to obtain a reasonably accurate estimate of offenders’ means. And the opportunity can and should be taken to look radically both at the way in which fine collection and enforcement is organised and at a series of sanctions which are equally effective in relation to those who persistently refuse to pay fines, fiscal fines/compensation orders and other penalties. The Committee recognises the existence of a small
hard core of fine defaulters who absorb a disproportionate amount of system time and effort. Their fines will be difficult to collect no matter what the system. But a better-focused system should be more effective even in relation to them.

32.52 Accordingly, we consider that the Executive should take a radical end-to-end look at the whole process of setting, collecting and enforcing fines and other financial penalties imposed for breaches of criminal law on the lines suggested above. The Executive should make every effort to ensure that at every stage the benefits of paying and the risks of not paying should be real and should be made clear to the offender, whatever his or her financial circumstances. Enforcement should no longer be a matter for the police: front-line police officers should be able to concentrate on front-line police tasks. The courts should not continue to be involved in routine enquiries into the means of offenders, once a fine has fallen into default – giving more time to pay or making marginal adjustments in the amounts payable. The Scottish Prison Service should be relieved of the need to admit large numbers of prisoners to prison each year for very short periods indeed.

32.53 The challenge will be to deliver a sufficiently robust system for enforcing fines to avoid the need for direct imprisonment for fine default while maintaining public confidence in the sanctions available through the system. The Committee notes a high level of public and Parliamentary concern about fines enforcement. It is hard to defend a situation where 21,000 means warrants are outstanding in the Strathclyde area alone when there are many more urgent and obvious tasks on which the police should focus. In structural terms, therefore, the Committee recommends strongly to the Executive that taking forward the recommendations in this chapter should be a high priority. It also notes that the full benefit of change in this area can only be realised within the context of a unified summary court.

We recommend that the Executive should take responsibility for fine enforcement away from individual courts and bring it together within a single delivery organisation – which could be a separate arm of the Scottish Court Service or a free-standing public sector organisation.

Wherever practicable, financial penalties which carry an ultimate criminal sanction, should be collected and enforced by the new agency, which would have a variety of new powers.
We recommend that the Executive should explore, with the Department of Work and Pensions, the options for making the deduction from benefits scheme operate more effectively in Scotland.

We recommend that the Executive should consider how arrestment of earnings orders might be better used as a means of fine enforcement.

We recommend that a thorough examination of the unit fines system should be undertaken in the context of the revised approach to Summary Justice proposed in Scotland.
Chapter 33

HOW WILL WE KNOW WHETHER THE CHANGES WE RECOMMEND ARE WORKING?

33.1 The Committee recognised the importance of building into the system ways of measuring the success of the changes recommended.

33.2 Paragraph 5.30 refers to the work now being done to take forward the recommendations of the Normand report for joined up targets across the system and for the creation of criminal justice boards at national and local level to monitor system performance. The Committee strongly supports that work, and sees the National Board as the natural forum within which to develop the recommendations below. We saw our role as indicating to the Board the direction which we consider quality monitoring of the summary justice system should take.

33.3 Before considering targets, however, the Committee considered a more radical option. Should we recommend that a new statutory time limit be set for the completion of summary cases? Most of our recommendations seek to achieve a more speedy summary justice system. Why not guarantee greater speed by providing that cases which have not completed their passage within (say) 6 months of the alleged offender being reported to the procurator fiscal can no longer be prosecuted?

33.4 We have seen the results of an exercise that tracked summary cases from the time of the report to the procurator fiscal to the date of the last court hearing associated with the case. This exercise, which looked at cases closed in the period July to September 2003, was constructed to allow us to compare it to a similar exercise looking at cases closed between April and September 1997.

33.5 The longer time period over which the sample in the 1997 exercise extended (6 as opposed to 3 months) and the greater levels of District court business account for the higher numbers of cases closed in the earlier exercise. Nevertheless the comparisons between the percentage figures are interesting and appear to confirm that the time intervals have increased.
33.6 In sheriff courts the proportion of cases completed at each of the 10-, 15- and 25-week intervals was around 6 percentage points lower in 2003 than in 1997. The difference is less marked in the district courts, though there were reductions of 4 and 6 percentage points respectively in the proportion of cases completed at the 10- and 15-week intervals. This was despite a significant fall in the district court caseload between the 2 years sampled.

<table>
<thead>
<tr>
<th>From date of report to procurator fiscal to date of last court</th>
<th>By 10 weeks</th>
<th>By 15 weeks</th>
<th>By 25 weeks</th>
<th>By 50 weeks</th>
<th>By 75 weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td>District court 2003</td>
<td>2,593</td>
<td>4,612</td>
<td>7,258</td>
<td>9,380</td>
<td>10,049</td>
</tr>
<tr>
<td>District court 1997</td>
<td>11,113</td>
<td>18,773</td>
<td>26,762</td>
<td>33,645</td>
<td>35,999</td>
</tr>
<tr>
<td>Sheriff court 2003</td>
<td>4,925</td>
<td>7,475</td>
<td>11,386</td>
<td>16,493</td>
<td>18,364</td>
</tr>
<tr>
<td>Sheriff court 1997</td>
<td>11,214</td>
<td>17,141</td>
<td>24,615</td>
<td>32,692</td>
<td>35,929</td>
</tr>
</tbody>
</table>

COPFS data: summary cases closed April-September 1997 and July-September 2003

33.7 It will be noted that the statistics above take no account of the period from date of offence or from the date when the alleged offender was charged to date of report to prosecutor fiscal.

33.8 The Thomson Committee of 1975 recommended that there should be statutory 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 before 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, should 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 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.
33.9 There was within our Committee a deal of sympathy with the view expressed by the Thomson Committee. One of our key objectives throughout our review of the summary system has been the need to make the system quicker and to make the system more effective from the point of view of victims and witnesses, as well as dealing fairly with the accused. During the course of our consultations a number of people expressed support for the introduction of statutory limits for all summary business.

33.10 However, we have reluctantly come to the view that, while it would be desirable to send a clear message about the need for a swifter system, the principal beneficiaries of a statutory time limit at present would be accused who manage to delay their cases or who are lucky enough to be able to take advantage of systemic delays. It will be noted, for example, that the table above shows that at 6 months around 40% of sheriff court and 30% of district court cases have not been completed. We have no doubt that there would be justifiable and widespread public concern if large numbers of cases were to fall simply because they had passed a certain time barrier.

33.11 We take the view then that, if a statutory limit is not feasible, there should be instead rigorous and simple targets that are easily comprehensible and are regularly published. We note that at present there are various sub-targets within the system. We are aware the police operate up to a 4-week target in which to provide a report to the procurator fiscal. The fiscal then operates to a 7-week target to take action, allowing a further 3 weeks for the case to call for the first time in court, and there is a 20-week target for 85% of summary cases to be completed within sheriff courts.

33.12 We have elsewhere stressed the importance of taking a whole system approach to improving summary justice. Our overriding commitment is that summary justice should become more summary. To achieve this, all stakeholders need to take shared responsibility for the progress of a case from the date when it is made known to the police to the date of disposal (court or non-court).

33.13 The Committee recognised, however, that it only had information on the progress of cases which had been prosecuted and had come to court. It found it difficult, and sometimes impossible, to obtain useful information on the progress of cases which were not prosecuted and on the overall progress of cases which were prosecuted at each stage prior to the date of their first calling in court. A substantial proportion of cases are offered non-court disposals or are marked “no
prosecution” (see the table at paragraph 11.2). We were unable to establish the average time such cases take from caution and charge to disposal. Accordingly, we recommend that more information be collected about the proportion of cases disposed of at each stage of the process over time and also the time taken to handle not just those cases in which there is a prosecution but different populations of cases – for example, those in which warnings are issued, fixed penalties and fiscal fines are offered, and cases marked “no proceedings”.

Information relating to the proportion of cases disposed of at each stage of the process over time would provide a better picture of what happens to all cases – enabling more effective management of the processes concerned in turn.

33.14 In relation to cases which come to court, the overarching time target should relate to improving the overall time taken from the point at which the system becomes aware of the crime or offence (or possibly the date when a person is cautioned and charged) to the date of disposal or the date on which sentence is deferred other than for reports. Within that target, individual organisations would inevitably have sub-targets for their contribution to the overall process, e.g. the time taken by the police to report cases to the procurator fiscal, the time taken by procurators fiscal to get cases ready for court and the ability of the court to accept such cases when they are ready. (Some courts restrict the numbers of new cited cases they will accept each week from COPFS.) In relation to cases diverted from prosecution, we recommend that the National Criminal Justice Board should consider what further information needs to be collected in order that sensible time targets can be set.

33.15 The Committee also felt that time targets were only part of the answer. Speed of processing without adequate quality control simply passes on problems to the next partner in the system, resulting in delays later in the process. So quality controls are also required. They and the targets selected should be set with a view to increasing consistency across the system so that significant inconsistency of performance can be easily identified.

33.16 As the Committee noted, the running of all complex systems results in a mix of productive work and wasted effort. The focus of targets should not simply be to speed up the process, but to minimise the amount of wasted effort at each stage. We noted, for example, the English emphasis on reducing the number of “cracked trials” – trial hearings at which no evidence is heard, because, for example, the accused pleads guilty or the Crown abandons the case before evidence is led.
33.17 Many of the concerns expressed to the Committee related to the high proportion of work in the system which could be classified as “wasted effort” and many of our recommendations are targeted at its elimination. There is widespread concern that cases which are prosecuted are too often “churned”, i.e. they are continued or adjourned, frequently without any discernible progress having been made since they last called in court. This concern was most forcefully expressed to us in relation to the number of trials which are adjourned on the day of the trial, a good number of them in some courts not for the first time. Our proposals for the increased use of a more flexible range of alternatives to prosecution should ensure that cases are dealt with as soon as possible after they enter the system. Where prosecution is required, our recommendations on more effective use of intermediate diets are intended to ensure that cases come to trial only when they are ready to be heard and when a plea of not guilty will be sustained. Other recommendations seek to minimise wasted effort on the part of the police and other witnesses by reducing the need for them to come to court to give routine or uncontroversial evidence. The success of any changes made following this report should be capable of evaluation.

33.18 The Committee therefore recommends that the National Criminal Justice Board should seek to identify quality controls and targets which in combination will help to eliminate those factors which this report identifies as leading to wasted effort on the part of one or more agencies. In many cases these will be targets shared between agencies. For example, making intermediate diets fully effective depends on good quality information about witness citation. One quality target which might be jointly owned by the police and COPFS service might therefore be that of improving the proportion of witnesses fully cited by the time of the intermediate diet. The joint ACPOS/COPFS protocols on citation (discussed above at paragraph 19.8) are a good example of the increasing recognition within the system that joint agreement on quality standards is the way forward. We strongly support this approach, and feel that so far as possible it should be reflected in joint target setting.

33.19 The Committee also considered the importance of monitoring the effectiveness of the more specific recommendations in this report. For example, we have made recommendations for altering the process following the issue of fiscal fines and fiscal compensation orders and for major changes in the enforcement of all financial penalties, including court fines. If a decision is taken to implement those recommendations, targets need to be set for the percentage of fines and other financial penalties paid in full, the time within which they are paid and the cost and overall effectiveness of the enforcement process. Similarly,
the Committee has recommended considerable expansion of the use made of alternatives to prosecution, and it is therefore important to ensure that these alternatives are acceptable and workable in practice and are consistently applied across the country. So targets for acceptance of fiscal fines and fiscal compensation orders would be appropriate.

33.20 Other critical areas in which targets should be set include the satisfaction levels of those who become involved in the system and their objective experience. SCS already carries out a survey of court users which could be expanded to cover the basic information need to measure user satisfaction. But targets are also needed to measure whether objectively the experience of court users is improving. This would need to be based on information collected on a court by court basis on (for example) the number of witnesses cited to attend court per day, the number who attended on time, the proportion of accused and witnesses who gave evidence, the proportion of accused who were required to wait for one hour or less before the case for which they were cited commenced and the average delay between arrival time at court and the time at which witnesses gave evidence. This information might be obtained through a regular sampling process rather than by continuous collection.

33.21 Such information is gathered in Magistrates’ Courts in England and Wales. The performance of courts in Scotland as they affect users is currently monitored less comprehensively than it should be, although the Committee is aware of and supports work currently underway between SCS and the Crown on an agreed core data set to support joint work on improved local effectiveness.

33.22 The example of the courts highlights the fact that setting targets is pointless unless the right management information is available. And management information is not just a means to the end of target setting. Enabling individual courts or local criminal justice boards to look at their performance against the Scottish average, for example, is in itself useful. Better provision of more and more focused information to local and national stakeholders will in itself be a motivator which should help to drive up performance.

33.23 The Committee therefore recommends that there should be a clear process within the system for determining the most relevant performance information and for generating it on an area by area and/or a court by court basis. This should be an easily comprehensible system capable of benchmarking between areas and susceptible to trend analysis.
33.24 The ISCJ IS project will continue to have a central role in the development of whole system management information (see paragraph 5.15 for a short description of the project). As a project ISCJ IS is moving beyond the basic task of linking information for case management purposes and is now focusing in addition on the scope for deriving cross-system management information from the exchanges.

33.25 A group of experts from the agencies involved is now looking at the best way of gathering and storing the management information required to facilitate easy extraction at a range of levels by partner agencies.

33.26 A number of the proposals outlined in this report (most notably the unification of courts administration) will considerably simplify the future development of ISCJ IS. The Committee noted, however, some confusion among those to whom it spoke as to how the future strategic direction of ISCJ IS is set. We therefore welcomed the fact that ICSJ IS was being brought within the responsibility of the new National Criminal Justice Board, and the fact that ICSJ IS is now focusing on the potential of the systems now linked together to generate usable management information to inform policy.

33.27 We therefore recommend that the working up of detailed system targets should be the responsibility of the National Criminal Justice Board, which is uniquely well placed both to agree the best detailed targets and to ensure that the necessary management information is available to monitor those targets in practice.

33.28 The Committee also noted, however, that analysis of management information needs to be complemented by a close practical look at how the system operates on the ground. Local managers do this routinely, but more independent scrutiny is also required.

33.29 We noted the creation of an independent Crown Office inspectorate, complementing that already in place for the police. We also noted the potential role of Audit Scotland, which has recently looked in detail at how effectively the system deals with offending by young people.

100 More information on ISCJ IS can be found at http://www.scro.police.uk/iscjis.htm.
101 Dealing with Offending by Young People, Audit Scotland, December 2002.
33.30 The Committee therefore recommends that there should be regular thematic cross agency inspections of critical elements of the criminal justice system. Joint working between the inspectorates and regulatory bodies already in existence should build up a collaborative strategy for regular sampling of the effectiveness of service delivery by the system as a whole. A lay element to such inspections will be important, since it is important to move from the perspective of organisation which suits the agencies involved to organisation which delivers a better service to the system users, particularly victims and witnesses.

We recommend that more information be collected about the time taken to handle not just those cases in which there is a prosecution but different populations of cases - for example, those in which warnings are issued, fixed penalties and fiscal fines are offered, and cases marked “no proceedings”.

In relation to cases diverted from prosecution, we recommend that the National Criminal Justice Board should consider what further information needs to be collected in order that sensible time targets can be set.

We recommend that the National Criminal Justice Board should seek to identify quality controls and targets which in combination will help to eliminate those factors which this report identifies as leading to wasted effort on the part of one or more agencies.

We recommend that there should be a clear process within the system for determining the most relevant performance information and for generating it on an area by area and/or a court by court basis. This should be an easily comprehensible system capable of benchmarking between areas and susceptible to trend analysis.

We recommend that the working up of detailed system targets should be the responsibility of the National Criminal Justice Board.

We recommend that there should be regular thematic cross agency inspections of critical elements of the criminal justice system.
INTRODUCTION

1. We support the principle of the unification of the summary criminal court system. By that we mean that all courts should be funded by the Scottish Executive and administered by the Scottish Court Service. We agree with the conclusion that sheriffs should continue to hear summary criminal business, but we do not agree with the introduction of the proposed summary sheriffs to replace lay justices. We suggest that there is a place for lay justices in our summary criminal justice system and dissent from the proposition that lay justice should be abolished.

2. We think that the onus is on those recommending the abolition of lay justice to demonstrate that it is intrinsically undesirable and unworkable in the overall context of the unified summary court system, centrally administered, which the Report proposes and which we support.

3. Our arguments, set out below, are based on what we see as the inherent desirability of retaining the role of the lay justiciary in dealing with less serious crimes, and the absence of concrete evidence that moving to an all professional judiciary will significantly improve the delivery of justice in such cases.

4. We would not argue that lay justice as it operates is perfect and we set out below our proposals for improvement. Nor are we arguing that lay justice is better because it is cheaper to provide and therefore more efficient. The costing evidence from the main Report reveals some difficulty in costing accurately the total cost to society of the way in which summary justice, lay or professional, is provided. While we consider that greater efficiency and cost effectiveness could be achieved by making fuller use of lay justices with the enhanced powers and disposals we suggest below, our arguments are not based on saving money. We recognise and develop in more detail the arguments for greater investment in quality lay justice, particularly in respect of recruitment and training. These will have resource implications.
5. We therefore invite Ministers to consider the following questions:

- Is lay involvement in the dispensing of summary justice desirable in principle? and
- Is it possible and cost effective to improve the delivery of lay justice to fit in with a new unified system and to safeguard and enhance its credibility?

6. Only if Ministers conclude that the answer to both these questions is “no”, we submit, should they decide that the correct way ahead is to move to a fully professional summary justice system.

ARGUMENTS FOR LAY JUSTICE

Community Participation

7. Lay justice is a powerful expression of community participation in the regulation of society. It seems inconsistent to retain it in the most serious cases – in which completely untrained juries make key decisions on the evidence – but to remove it in the context of summary justice.

8. Reflecting the views of Lord Justice Auld on English and Welsh magistrates, Scottish justices “have an important symbolic effect of lay participation in the criminal justice system which should not be undervalued”. The existence of citizens across the country, with a practical understanding of what the law is and how it works, is of great importance in a democracy.

9. That lay justice is not found in other parts of the world, apart from England and Wales, ignores the fact that lay involvement depends on the cultural and political tradition of a country. The role of Scottish justices of the peace has evolved over a period of 400 years and is capable of further evolution.

The nature of the lay judiciary

10. Arguments in favour of lay justice which have been put to the Committee include:

- the importance of community links and community awareness which Justices of the Peace enjoy;
Note of Dissent

The proposition that the lay bench represents the community it serves;
the capacity of non-professionals to reach a balanced judgement on their peers;
the fact that justices are volunteers who are less vulnerable to case-hardening.

11. Justices to whom the Committee spoke felt strongly that they had a good understanding of the issues which affected the community within which they were delivering justice. We recognise that strength.

12. The main report quotes figures on the composition of the lay justiciary which suggest that it is not fully representative of the Scottish population. We would, however, observe that the figures in the main Report refer to all justices. In practice, however, in 2001-02 of the 3790 serving justices in Scotland, 1806 were “signing justices” and 1984 full justices, of whom only 729 were needed for court duties. There appear to be no available statistics showing an analysis of those who sit on the bench, nor any evidence that they represent a narrow part of the community, since no information on the social status, age or gender of bench-serving justices is collected.

13. We acknowledge that in the past the process of identifying candidates to become a JP has in some cases tended to produce a bench much in the image of the one which preceded it, rather than improving the representative nature of the bench with each succeeding generation of JPs. Nevertheless, they do reflect, not perfectly and with room for improvement, the mix of the community from which they are drawn. Improvements are already happening. In the last 20 years, there has been a move in a number of areas towards a more open system of recruitment where nominations come from the local community and there is a structured and robust selection thereafter. In addition, changes are in immediate prospect in the process of appointing members of Justice of the Peace Advisory Committees (JPACs) – critical to the process, since they recommend candidates for JP office to Ministers. The changes, essential to bring JPACs into line with public appointments procedures, will make appointments to them more open and bring an element of external accreditation to the recruitment process.

14. Looking at recent appointments alone does suggest that change is happening, albeit perhaps slowly. For example, the Scottish Ministers appointed 60 justices in 2001-02 of whom 24 (40%) were female. Two came from ethnic minority groups. We recognise the arguments for keeping information on social,
occupational and ethnic origins of JPs. We think that, building on the improvements already made, it will be possible to make the composition of sitting Justices broader and more consistent with the range of social and ethnic backgrounds in the Scottish community and therefore give better expression to the principle – which we firmly support – of involving community members in the delivery of justice. However, these comments must be seen in light of the overarching principle of judicial appointments which must be that the best candidates are appointed.

15. We are not opposed to the proposal in the main Report that thought should be given to giving local communities and individuals scope in other ways to make their views felt in the criminal justice system. A local criminal justice forum – perhaps a consultative group of lay persons feeding into the local criminal justice boards recommended by the Normand Report and now being piloted – may well be an excellent idea. We would submit that it is no substitute for direct involvement of lay people in dealing with less serious offences which have a real impact on community wellbeing.

The capacity of lay justices to perform their judicial role

16. We see no reason why lay justices should not properly fulfil the judicial role. We saw evidence of this on our visits to district courts.

17. A judge in the summary criminal court is concerned with sentencing, assessing evidence in trials, regulating proceedings and controlling conduct in court. These activities are governed by legal rules, which define the area of discretion within which the judge has to work. Lay justices must understand the legal framework within which the court operates and the procedures to be followed. This knowledge can be gained through appropriate judicial training. On points of law and evidence they have the advice of legally qualified clerks.

18. The key qualities required of a judge, however, include the ability to follow a reasoned argument, think logically, act with confidence and fairness and make decisions. The possession of these qualities depends on personal characteristics and experience of life. Individuals from a range of backgrounds have many, sometimes all, of these qualities and therefore could become good judges.

19. As Lord Thomson said in his foreword to the booklet “What Scots Magistrates Should Know”:
“A few lucky people may be born judges but most of them have to learn to be judges the hard way. Being a judge is just a job like any other job. You have to work at it and learn how to do it.”

Sound training is needed at all levels, even for the born judge, because the public is entitled to demand the very highest standards from all, lay and professional.

20. We note that some individuals and groups argue strongly in favour of a fully professional judiciary, including the majority of professionals who earn their livings in courts. They base part of their argument on the grounds of greater consistency on the part of professionals, but no objective evidence for this has been produced.

WILL ABOLISHING LAY JUSTICE HELP TO SOLVE THE CURRENT ISSUES IN THE SUMMARY JUSTICE SYSTEM?

21. The evidence gathered by the Committee, and the responses to the First Order Consultation, identified major issues in the summary criminal justice system to be:

(a) The time taken for the police to report cases to the procurator fiscal;
(b) The time taken to get cases started in court;
(c) The time taken for cases to reach a conclusion in court;
(d) Procurator fiscal service under-funded and under-staffed;
(e) Lack of disclosure of information by the Crown to the defence which would allow early resolution of cases;
(f) Lack of preparation of cases for whatever reason by both prosecution and defence leading to abortive intermediate and trial diets;
(g) The manner in which legal aid operates in that solicitors who plead guilty at an early date for their clients are not adequately remunerated;
(h) Too many late pleas;
(i) Ineffective citation of witnesses;
(j) Delays in enforcement of warrants;
(k) No apparent system of discounting for early pleas;
(l) Delays in breach proceedings in respect of non-custodial disposals;
(m) Key personnel in the criminal justice system not doing what they were meant to do when they were required to do it.
22. Where possible, these issues have had the attention of the Committee. It is noteworthy that, since the evidence was gathered, some of the issues have already been addressed. Very considerable additional resources have been made available to the Crown Office and Procurator Fiscal Service; police reporting targets have been set; a new system of citation of witnesses was introduced by Crown Office, with new target times of citation for fiscals and the police; there has been a High Court decision on sentence discounting; a committee has been set up to address delays in breach proceedings in respect of non-custodial sentences.

23. As the list above indicates, the key concern of the Committee was to eliminate delays and inefficiencies in the system, ensuring that summary justice could be delivered more speedily. We are not convinced that the abolition of lay justice would contribute to this goal. The evidence in the main report for slower justice in lay courts is English, and not based on Scottish experience. In the same research paper Professor Morgan also notes that factors other than the identity of the judiciary – for example, waiting times – significantly influenced overall court efficiency.

24. There is no evidence of a groundswell of public dissatisfaction with the current judges in the summary system. It is certainly not clear that the abolition of lay justice would resolve the above issues.

The advantage of a lay court

25. The sheriff court at present struggles to deal with its caseload. Problems of efficient dispatch of business will increase as a result of the Bonomy proposals to increase the solemn jurisdiction in the sheriff court from three to five years. As is noted in the main report, there is a need to move criminal case work downward throughout the system to relieve increasing pressure on the solemn courts.

26. The existence of a lay court running parallel to the sheriff court would allow less serious cases to be dealt with expeditiously rather than competing for priority, as in the present overstretched sheriff court. There various cases are said to be “priority” perhaps because the accused is in custody, because of the nature of the case, or the identity of certain witnesses. These priority cases preclude the hearing of what are seen as “non-priority cases”. We recognise that every case is important to the persons involved and it is wrong that, because a case is seen as “non-priority” that those involved should have to wait for justice. The district court
is a major resource, currently underused, which could absorb more business and take the pressure off the sheriff court.

**Reduction in court business**

27. While we fully support the principle that cases should where appropriate be diverted from prosecution, we are sceptical about the assumption in the main report about the number of cases overall that could be diverted from the courts altogether by way of a fine, thus greatly reducing the volume of business at the lower end.

28. It is the duty of the police to investigate crime. It is the duty of the Crown to prosecute crime. It is the duty of the judges in summary courts to determine guilt and impose sentence. We consider that great care should be taken before vesting substantial extra powers in the police or the Crown. Police should only be empowered to impose fines by way of Fixed Penalty Notice in well defined and minor circumstances. In acknowledging the success of fiscal fines to date, we should be slow to give to the Crown a major sentencing role in addition to that of independent prosecutor.

29. Many of the alternatives to prosecution are appropriate only to first offenders or offenders with minor records not charged in conjunction with anything more serious. We understand that this point was made, for instance, when new police FPNs for road traffic offences were introduced in mid-2003. It would not be appropriate for police to give a fixed penalty notice to someone who has a substantial criminal record or a number of outstanding fines. It is understood that records will be kept at the Scottish Criminal Records Office of fines recorded against any individual. Where there are a number of outstanding fines, there should be a prosecution. Many offenders need support and advice in the community, not more fines which they cannot pay. Courts are in a position to provide these services through the various non-custodial sentences now available.

30. Discussions with procurator fiscal suggest reluctance to impose fines at levels much higher than those presently available, so we query the scope for increased diversion from increasing the fiscal fine limit. We also see limited scope for fiscal compensation orders. There is the question of fairness. Is it right that someone with means could escape prosecution and a criminal record by paying a large amount of compensation, while someone who cannot pay is prosecuted? We agree with the views of consultees that fiscal compensation is not appropriate
for physical injury and suggest that not all offences involving damage to property are suitable for diversion. In many cases, the damage forms only a small part of the criminal conduct cited in the complaint and/or the accused has such a substantial criminal record that diversion would not be seen to be appropriate.

31. We note the proposals in the main report that persons who are sent an offer of a fiscal fine or fiscal compensation order and do not respond will have a fine or order registered against them without conclusive proof that they have received the offer. The Stewart Committee was concerned about the “concept of deeming guilt by silence”. We share that concern. If an offer is not accepted, there should be prosecution.

32. Courts are also required to deal with instances where diversion is challenged. Such challenges may increase as a result of fiscal fines and fixed penalty notices being enforced as fines (and not civil debts) and the proposal that they be referred to in subsequent proceedings. Future proposals for fine enforcement, we consider, will need to retain a role for the court in the interests both of justice and of credibility. We therefore feel that there will continue to be a substantial role for judges who deal with the less serious offences in summary business – lay justices.

THE RIGHT APPROACH

33. In short, we suggest that the right approach here is that taken by Lord Justice Auld in his recent monumental review of criminal procedure in England and Wales: to explore;

“Whether there is a clear need for change and if so, what change might be feasible and sufficiently worthwhile to justify the disturbance of well established structures and procedures.”

34. Lay justice has a long history, and, in our view, there is no objective evidence before the Committee that overall it has failed to deliver justice to those accused who have come before lay courts. In our visits to district courts around Scotland, we have seen a variety of practice, some better than others, but we do not think that we have seen justice denied through the use of lay justice. The continuation of lay justice is supported not only by those who responded to our own first order consultation (responses to which were, we accept, dominated by those involved in or representing lay justice) but also by respondents to the public survey. As the
main Report records, 60% of those responding to this public survey thought the use of lay magistrates should be continued, with 26% preferring a wholly professional system. 59% thought that both lay and professional judges were consistent in the way they deal with cases. 64% thought both were impartial and not prone to prejudice.

35. Interestingly, recent support has come from the highest level of the judicial system – in the form of dicta in the High Court of Justiciary and the Judicial Committee of the Privy Council in the case of Clark v. Kelly, which related to the role of the legal assessor in the district courts. In the Judicial Committee of the Privy Council in 2003 Lord Rodger of Earlsferry, a former Lord Justice General, said:

“District Courts have operated since 1975 when they replaced the old system of Burgh Courts and Justices of the Peace courts. During that time they have increasingly gained the confidence of the public, the legal profession and the High Court of Justiciary.”

36. In this context we therefore invite Ministers to consider carefully, before abolishing lay justice, whether they are convinced that abolition will produce an improvement in the justice delivered to those accused of less serious offences.

LAY JUSTICE IN PRACTICE: THE CURRENT DISTRICT COURTS

37. As the discussion above highlights, however, we do agree that if lay justice is to be retained, improvement must be made in a number of key areas:

- consistency of support and management;
- recruitment;
- training; and
- the court estate.

38. We would argue that any difficulties can be overcome through structured change and proper investment, producing a more confident and representative bench, delivering consistent justice across Scotland.

39. Before looking at this in detail, it may be helpful to note the context in which the district courts currently operate.
40. It is the statutory duty of local authorities to manage the district courts. Each local authority decides for itself what building or other facilities to provide and how to prioritise the provision and upkeep of such facilities alongside its other estate management responsibilities. Each also decides on the priority to be given to the training of justices, the provision of clerks, and the services of administration staff.

41. There is a variation in the standard of provision across the country. Some authorities are very generous and give great encouragement to lay justices by providing the highest standard of services for them and other court users, including the local fiscals, defence agents, police, court staff and, very importantly, members of the public. Some authorities, on the other hand, appear to have difficulty with this approach.

42. This variation contributes to the variation in quality of services to the court. It particularly affects the training of justices at both local and national level. If not properly funded, training cannot be properly provided. Clerks need to be trained too, not just in their court role but also in how to train and support their justices. Without adequate training it is difficult to attain a high standard of performance in court. It must be emphasised, however, that despite the difficulties in some commission areas, the quality of lay justice can be very high. With central administration, direction and funding and a uniform approach to the needs of all court users, the general performance of everyone involved can be improved.

43. Funding from central to local government includes an element for the provision of the district court with unhypothecated revenue support grant, but this is not ring-fenced and it is up to each local authority to decide where to target its resources. They receive no central funding specifically for recruitment and training.

A unified court system administered by the Scottish Court Service

44. We feel strongly that the first key step in improving lay justice is to implement the Committee’s unanimous recommendation for a unified court system. Justice is a national service and, while we support fully lay involvement in delivery, we do not see that as equating to licence for local variations in provision of estate, practice and management which are unjustified in terms of efficiency and effectiveness. In particular we note the response of the Central Advisory Committee on Justices of the Peace to the first order consultation where they said:
“The Committee expressed concern that local authority administration of the district courts could lead to variations in funding, estate and training. It was felt that there was a case for bringing the administration of all criminal courts under the co-ordination of the Scottish Court Service.”

These sentiments received support from representatives of the District Courts Association and clerks of court and also from justices to whom we spoke.

45. We recognise the contribution made over the years by the District Courts Association to give guidance, information and training to justices. Despite limited resources, it has run regular weekend training courses, disseminated information through its newsletters, produced good practice guidelines, a district court charter and a manual on signing duties. Of particular significance, it has developed a training programme based on standard national competencies. Its expertise could be of great value in implementing the new system.

PROPOSALS FOR THE STRUCTURE OF THE SUMMARY JUSTICE SYSTEM

46. We recognise that we must demonstrate how we think a retained lay judiciary would work in the context of a unified court system.

47. We propose that within the new unified court system, administered by the Scottish Court Service, there should be two divisions – the sheriff court division, dealing with more substantial and serious criminal business, and the district court division, dealing with less serious business. These divisions would be run by the Scottish Court Service but would operate separately. The sheriffs principal would have a statutory duty to secure the speedy and efficient disposal of all summary criminal business within their sheriffdoms. They would be assisted by local Criminal Justice Boards set up on the lines recommended in the Normand Report and now being piloted.

48. The sheriff court division would have power to impose custodial sentences of up to 12 months, fines of up to £20,000 and all the current non-custodial disposals available to them. The district court division would have power to impose custodial sentences of up to 3 months, power to disqualify from driving (we recognise that extending power to disqualify beyond “totting up” offences may be a reserved matter under Road Traffic legislation) and power to impose fines of up to £5,000. Facilities should be available in all areas to allow the imposition not only of Probation Orders, but also of Community Service Orders, Supervised Attendance Orders, and Restriction of Liberty Orders. Although cases
requiring imposition of a Drug Testing and Treatment Order, which are very resource-intensive and designed for significant and regular offenders, would probably be taken in the sheriff court, consideration should be given when the new regime has settled down as to whether resources can be made available to allow this disposal to be available in the district court division.

49. We consider that the availability of additional disposals in the district court would enable a significant number of cases currently prosecuted in the sheriff court to be dealt with in the district court division.

50. As at present, all decisions about allocating cases between the two divisions would be taken by the procurator fiscal. There should be no statutory provision dictating the criteria for allocation of cases between the two divisions, but guidance should be produced for procurators fiscal from Crown Office.

51. We would expect that normally less serious summary cases would be allocated to the district court division, where custodial sentences would not normally be anticipated in the first instance. However, power to impose a custodial sentence of up to 3 months should be available if required, for example in dealing with repeat offenders. In particular, the court should be able to impose a custodial sentence if an offender defaulted on a Probation Order, a Community Service Order, a Supervised Attendance Order or a Restriction of Liberty Order.

52. Cases for prosecution in the district court division would not, however, be expected to include any case, however minor, involving any new or complex issues of law or any serious matter of public interest, or any case expected to be particularly lengthy.

53. On the basis of the sentencing range suggested and as a result of increased range of disposals being made available, in particular the power to disqualify from driving, the district court division would be able to deal with a significant number of lower end cases currently prosecuted in the sheriff court. This would free up capacity in the sheriff court division to allow sheriffs to deal with more serious cases. Special courts, such as Drug Courts, Youth Courts and possibly in the future Domestic Violence Courts should be in the sheriff court division. There should be a facility to transfer cases from the district court division to the sheriff court division to facilitate a rolling up of cases where appropriate.

54. A court in the sheriff court division would be presided over by a sheriff sitting alone and a court in the district court division by a lay justice who would sit
with a legally qualified clerk. We do not see a continuing role for stipendiary magistrates in the district court division and would not therefore envisage those currently in post being replaced when they retire. However, pressure of work in Glasgow may render this necessary.

55. We do not think it is necessary for lay justices to sit in threes, given the jurisdiction suggested. The greater number of lay justices at present sit singly with a legally qualified clerk and are keen to continue to do so. Moving longer and more serious cases from the sheriff court may well result in more part-heard trials with a requirement to reconvene the court at a later date, and is likely to result in more cases having to be adjourned for reports prior to sentence. The difficulties in getting a bench of three together on an adjourned date might complicate matters and cause delays. If there is concern about justices operating singly, we are confident that this can be met through more comprehensive nationally organised and funded training to improve their skills.

56. The view has been expressed that sitting in threes produces a more confident bench which makes more consistent decisions, but no evidence was produced in support of this view. It is certainly not apparent in the Scottish Borders commission area where three benches sit singly and one sits in threes. We have observed that the move from a triple to single bench in West Lothian led to a more effective and efficient court, where justices were carefully selected and well trained.

57. We accordingly see distinct and separate roles for sheriffs and lay justices in the future summary criminal justice system. We consider the sentencing powers which we propose for the two separate divisions to reflect a proper balance and to allow a significant increase in the range of cases which may be dealt with by lay justices.

**ISSUES THAT WOULD REQUIRE TO BE ADDRESSED IF THESE PROPOSALS ARE ACCEPTED**

**Court estate and staffing**

58. The implications for the court estate and staffing would be different from those which would arise if the recommendation of the main Report was accepted. There would be a necessity for the Scottish Court Service to review the court estate to accommodate the two levels of court, and to employ sufficient staff, in particular legally qualified clerks, to sit with lay justices on a full or part-time basis.
Existing JPs

59. Ministers would require to note that JPs would no longer be appointed to the local authority commission areas but, on the proposal above, probably to areas based on sheriff court districts. As these districts differ from local authority areas and from police and COPFS areas in some places, we see considerable advantages in making new commission area boundaries co-terminous with sheriff court districts as well as police and COPFS areas. The commissions issued to current JPs would need to be reissued. Consideration would need to be given as to how best to match the distribution of justices to the level and location of court business.

60. We would also draw Ministers’ attention to the fact that only a fifth of Scottish justices actually sit on the bench. Our recommendations reflect a commitment to a representative bench of lay justices who sit in courts throughout Scotland. Recruitment efforts should be concentrated on such justices, and Ministers may wish to consider whether the provisions for signing justices to be recruited in the same process are appropriate.

Recruitment of justices

61. Once courts are no longer linked with local authority areas, careful thought would require to be given to achieving a high national profile for recruitment on a consistent basis across Scotland without losing the element of local involvement and ownership. We need to widen awareness of the role of the lay justice and what it offers to the community, together with a more open and externally accredited selection process.

62. The approach taken in relation to recruitment for Children’s Panel members may be a useful model. We understand that a national recruitment campaign is organised and funded; this supplements local campaigns overseen by Children’s Panel Advisory Committees (CPACs) using common materials, images and themes. Candidates are then interviewed and recommendations put forward to Scottish Ministers by the CPAC in each local authority area. The chairs and the majority of members of the CPACs are Ministerial appointments; others are appointed by local authorities. We understand that the review of the Children’s Hearings system will be looking at the current arrangements to consider whether they best support the system.
63. Building on the current model in the Hearings system, a possible approach in Scotland might be national recruitment of JPs, with interviewing and recommendations for appointment carried out by reconstituted Justice of the Peace Advisory Committees (JPACs) based on sheriff court districts. JPACs might have a lay chair appointed by Ministers following open competition. Members of JPACs might be recruited by public advertisement to produce a mix of lay members and members who are bench-serving justices. Consideration could be given to the nomination of one or two members from the local shrieval bench and from court users.

64. There require to be national standards and procedures for the recruitment of justices which are consistently applied across the country. Vacancies should be publicly advertised. A selection process which is transparent and fair to recruit from all backgrounds is central to the success of the system in future. Any new procedure should aspire to achieve a body of justices who truly reflect the communities they serve. Recruitment procedures both for JPACs and for justices should be compliant with the OCPA Code.

Training

65. The very best training must be provided to ensure that lay justices deliver the highest quality of service to every community in Scotland. Excellent models for competence-based training, initiated by the District Courts Association and delivered locally, already exist and are in operation to varying degrees in several commission areas. What is required is central commitment to resource and implement them across the country. We suggest that they could be directed and developed further under the auspices of the Judicial Studies Committee, leading to mandatory training programmes for new and existing justices. This might profitably involve sheriffs. Regular competence based training for clerks would also be necessary. Although training should be under the supervision of the Judicial Studies Committee, we envisage that most of the training would have to be and should be delivered locally.

66. Justices have already shown a heartening willingness to undertake training, and we can see no difficulty in this extending to the major time commitment that training to deal with more cases will involve.
Minimum number of sitting days

67. Ministers may wish to consider whether to set a formal target for the minimum number of days per year on which a justice could sit. In England and Wales at present the target is 26 half-day sessions (13 days per year). There is no simple answer to this and we recognise the different levels of demand in urban and rural areas. Nonetheless, if justices are to be well trained we recognise that the cost of that training and the commitment which it entails would need to be reflected in a commitment to sit regularly. Otherwise full advantage would not be made of the investment in training which has taken place and the justices would not sit often enough to gain the experience which they should have to sit in judgement on their fellow citizens.

68. The average figure given for Scottish sittings is 7.4 days per year. It should be borne in mind that at present there is a pool of experienced justices who are greatly underused and have the capacity and willingness to take on much more work. With more business this figure would increase. More business would also reduce running costs in most courts and make the district court division clearly cheaper than indicated in Professor Stephen’s research, which did not show conclusively that lay justice is cheaper than professional justice, or vice versa.

CONCLUSION

69. We regret that our strength of feeling on this particular issue has led us to register a note of dissent to the recommendations of the Committee as a whole on this one point. However, we feel strongly that the decision on the future of lay justice should be made on the grounds of principle rather than of expediency, tidiness or personal preference.

70. We consider that, with their capacity to deal appropriately with cases on different levels of seriousness, there is a separate role for both sheriffs and lay justices in the two divisions of the summary criminal justice system, and our proposals reflect our views on this matter.

71. We submit that it is possible to remedy any perceived shortcomings in the present system without taking the more drastic step of ending the direct participation of lay people in delivering justice to those who offend in our communities.
72. We do not accept the conclusion of the majority that Scotland should now move to a wholly professional justice system. We think that with a proper selection procedure and well focused training the sentencing powers which we propose should result in a substantial amount of business being properly handled by lay justices. We are not aware of any argument that the lay justice court, currently constituted, is in breach of ECHR. We see no reason why, with appropriate training, lay justices should not be pro-active and willing to challenge defence and prosecution delays. Revised selection procedures should allow justices to be even more representative of the communities they serve.

73. The case for the abolition of lay justice is not rooted in research or objective analysis of the performance of Scottish district courts. The argument is not whether there is a future for lay justice, but rather how the overall system can be improved to secure a future which imparts confidence to everyone: victims, witnesses, accused persons, court users and, above all else, the communities they serve.

74. Scottish justices of the peace of the 21st century continue an ancient tradition of voluntary public service. Their willingness to be actively involved in their communities’ problems is worthy of support and development.

75. If Ministers were to accept the submission of COSLA that local authorities should continue to administer the district courts on the basis of full funding of this service from the Scottish Executive and an agreement of a national framework within which local administration is undertaken, we would submit that the arrangements for the division of business between the two levels of court would be as set out in this note.
### Annex B

**LIST OF RESPONDENTS**

**SUMMARY JUSTICE REVIEW - FIRST ORDER ISSUES CONSULTATION**

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<tr>
<th>Name</th>
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<td>Bain, Edward</td>
<td>Edinburgh City Commission Area</td>
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<td>Benson, Jane AR</td>
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<td>Bowen, Edward F</td>
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<td>Bradley, Dan</td>
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<tr>
<td>Strang, Jim</td>
<td>Orkney Islands Council</td>
</tr>
<tr>
<td>Name</td>
<td>Organisation (where appropriate)</td>
</tr>
<tr>
<td>------------------</td>
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<tr>
<td>Tait, Harry</td>
<td>Fife Commission Area</td>
</tr>
<tr>
<td>Tasker, Jack</td>
<td>West Dunbartonshire Commission Area (JP)</td>
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<tr>
<td>Urquhart, Jack</td>
<td>Association of Scottish Police Superintendents</td>
</tr>
<tr>
<td>Vlea, Judith</td>
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<tr>
<td>Wallace, Patricia</td>
<td>Clerk of Glasgow District Court</td>
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<tr>
<td>Wardrop, WNC</td>
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<tr>
<td>Watson, Audrey</td>
<td>West Lothian Justices’ Committee</td>
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<tr>
<td>Watson, Audrey F</td>
<td>Clerk of West Lothian District Court</td>
</tr>
<tr>
<td>Wheatley, Lord</td>
<td>High Court</td>
</tr>
<tr>
<td>Wilson, Mary</td>
<td>Association of Chief Police Officers in Scotland</td>
</tr>
<tr>
<td>Young, William</td>
<td>Aberdeen City Commission Area (JP)</td>
</tr>
</tbody>
</table>
## Annex C

### TABLE OF ABBREVIATIONS USED IN THE REPORT

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABWOR</td>
<td>Advice by Way of Representation (legal aid)</td>
</tr>
<tr>
<td>ACPOS</td>
<td>Association of Chief Police Officers (Scotland)</td>
</tr>
<tr>
<td>ADSW</td>
<td>Association of Directors of Social Work</td>
</tr>
<tr>
<td>CCTV</td>
<td>Closed Circuit Television</td>
</tr>
<tr>
<td>CJ S</td>
<td>Criminal Justice System</td>
</tr>
<tr>
<td>COPFS</td>
<td>Crown Office and Procurator Fiscal Service</td>
</tr>
<tr>
<td>COP II</td>
<td>Criminal Operations System II (SCS IT System)</td>
</tr>
<tr>
<td>COSLA</td>
<td>Convention of Scottish Local Authorities</td>
</tr>
<tr>
<td>CPACs</td>
<td>Children's Panel Advisory Committees</td>
</tr>
<tr>
<td>DDA</td>
<td>Disability Discrimination Act 1995</td>
</tr>
<tr>
<td>DVLA</td>
<td>Driver and Vehicle Licensing Agency</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>FTE</td>
<td>Full Time Equivalent</td>
</tr>
<tr>
<td>FPNs</td>
<td>Fixed Penalty Notices</td>
</tr>
<tr>
<td>ISCJ IS</td>
<td>Integration of Scottish Criminal Justice Information Systems</td>
</tr>
<tr>
<td>JP</td>
<td>Justice of the Peace</td>
</tr>
<tr>
<td>J PACs</td>
<td>Justice of the Peace Advisory Committees</td>
</tr>
<tr>
<td>MEC</td>
<td>Means Enquiry Court</td>
</tr>
<tr>
<td>OCPA</td>
<td>Office of the Commissioner for Public Appointments</td>
</tr>
<tr>
<td>PDSO</td>
<td>Public Defence Solicitors’ Office</td>
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<tr>
<td>SACRO</td>
<td>Safeguarding Communities - Reducing Offending</td>
</tr>
<tr>
<td>SAO</td>
<td>Supervised Attendance Order</td>
</tr>
<tr>
<td>SCRO</td>
<td>Scottish Criminal Records Office</td>
</tr>
<tr>
<td>SCS</td>
<td>Scottish Court Service</td>
</tr>
<tr>
<td>SDRO</td>
<td>State Debt Recovery Office (New South Wales, Australia)</td>
</tr>
<tr>
<td>SEJD</td>
<td>Scottish Executive Justice Department</td>
</tr>
<tr>
<td>SER</td>
<td>Social Enquiry Report</td>
</tr>
<tr>
<td>SIS</td>
<td>Sentencing Information System</td>
</tr>
<tr>
<td>SLAB</td>
<td>Scottish Legal Aid Board</td>
</tr>
<tr>
<td>SPR</td>
<td>StandardProsecutionReport</td>
</tr>
<tr>
<td>VSS</td>
<td>Victim Support Service</td>
</tr>
</tbody>
</table>
Overview of action within the criminal justice system 2001

Crimes and offences committed

- Non police source crimes & offences (e.g. TV licence offences)
  - Not recorded by police

- Reported to police
  - Not recorded by police

- Detected by police (e.g. speeding)
  - Crimes and offences recorded by police¹
    - Crimes 421,093
    - Offences 524,623

Recorded crimes and offences cleared up by police (number and % cleared up): ¹

- Crimes 188,966 (45%)
- Offences 502,670 (96%)

Dealt with by detecting agency

- Refer to other agencies (e.g. most children are referred to reporter)
  - Reports received by procurators fiscal²,³ 284,191

- Vehicle defect rectification scheme referrals
- Police warning
- Police conditional offers made (motor vehicle offences) 175,184

- No proceedings 42,898
- Procurator fiscal conditional offers (motor vehicle offences) 7,548⁵
- Fiscal warnings 20,333
- Fiscal fines 18,855⁶
- Other non-court action 11,628

Persons proceeded against⁶

- Crimes 51,222
- Offences 88,374

No charge proved 19,520 (14%)
- Custody 16,499 (12%)
- Cumunity sentence 13,565 (10%)
- Monetary 76,781 (55%)
- Other sentence 13,231 (9%)
1. Crimes recorded in 2001 may not be cleared up or dealt with until 2002 or later.
2. A report to the procurator fiscal may involve more than one crime or offence and more than one alleged offender.
3. The total number of reports to the fiscal includes reports on non-criminal matters such as sudden deaths.
4. Includes cases associated with other cases within the same Procurator Fiscal Office.
5. Figures relate to offers which were accepted.
6. Figures for persons proceeded against count the number of occasions on which a person is proceeded against.

A number of outcomes may result in subsequent prosecutions or referrals to other agencies, for example if a condition such as payment of a fixed penalty is not complied with. For simplicity, these pathways are not shown in the diagram.