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Evaluation of The Reforms to Summary Criminal Legal Assistance and Disclosure

Crime and Justice



EVALUATION OF THE REFORMS TO SUMMARY CRIMINAL LEGAL ASSISTANCE AND DISCLOSURE

Paul Bradshaw and Clare Sharp
Scottish Centre for Social Research

Pete Duff
University of Aberdeen

Cyrus Tata
University of Strathclyde

Monica Barry
Independent Consultant

Mary Munro
Independent Consultant

Paul McCrone
King's College, London

Scottish Government Social Research
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EXECUTIVE SUMMARY

Background

This report presents the findings of an evaluation of the changes to disclosure and summary criminal legal assistance (SCLA)¹ introduced under Summary Justice Reform (SJR). The overall aim of SJR is the establishment of a summary justice system which is: fair to the accused, victims and witnesses; effective in deterring and punishing offenders; efficient in the use of time and resources; and quick and simple in delivery.

The revised system of SCLA was introduced on 30 June 2008 and primarily increased the levels of payment to criminal defence solicitors at the early stages of cases including introducing a new case disposal fee. The policy objectives of the reforms to SCLA were to: ensure that solicitors are appropriately and fairly paid for the work they do; support investigation and preparation of cases to facilitate their resolution at the earliest possible stage; reduce bureaucracy where possible and appropriate; support the availability and delivery of sufficient criminal defence services of an appropriate quality; appropriately reward work undertaken to progress summary criminal cases; and support the cost effectiveness and efficiency of the wider criminal justice system.

The reforms to disclosure pre-pleading diet – rolled out in October 2007 – introduced the provision to the accused – in all summary cases – of a ‘summary of evidence’ based on the police report submitted to the Procurator Fiscal. The policy objectives for pre-pleading diet disclosure were to: provide the defence with a basis for early investigation of the case and discussions with the Fiscal; to inform the decision making process with the client regarding the plea which ought to be entered; to support more effective court hearings at pleading and intermediate diet; to enable cases to be concluded at the earliest possible stage in proceedings; and to support the new system model for summary justice.

Whilst SJR did not change the existing processes of disclosure of evidence after the pleading diet, the System Model underpinning the reform of summary justice (Scottish Government, 2007) contained statements about the need to improve the effectiveness of court diets. The procedures and practices around disclosure of evidence following a plea of not guilty can be seen to contribute directly to early, effective preparation for court diets. The operation of disclosure post-pleading diet was included in the remit of this evaluation. Subsequent changes to disclosure introduced by the Criminal Justice and Licensing (Scotland) Act 2010 were not within the scope of this research.

Aims and objectives of the research

The overarching aim of this evaluation was to assess the extent to which the reforms to SCLA and disclosure supported: the overall aim for SJR; the SJR overarching objectives; the SJR intended outcomes; and the specific policy objectives of SCLA and disclosure. In doing so, the research aimed to identify the key factors which

¹ Summary criminal legal assistance incorporates Advice and Assistance (A&A, paid to defence solicitors who provide initial advice on criminal matters), Assistance by Way of Representation (ABWOR, paid to defence lawyers in cases where the accused pleads guilty at pleading diet), Summary Criminal Legal Aid (paid in cases where the accused pleads not guilty at first calling) and payments to duty solicitors.

enabled or contributed to, and barriers which prevented, achievement of the reform objectives.

Methods

The evaluation employed both quantitative and qualitative methods to explore the practice and operation of disclosure and summary criminal legal assistance following the reforms, perceptions of the reforms among key actors involved in the summary justice system, the impact of the reforms on case trajectories and outcomes, and the financial impact of the reforms. To permit a detailed study of court operation and actors, and to allow consideration of data on summary business in the pre-reform period, the research focussed on summary business in the Sheriff rather than Justice of the Peace courts.

Qualitative data were collected via individual face-to-face or telephone interviews with criminal justice professionals and individuals who had been accused of summary crimes or offences. A qualitative analysis of a random sample of 192 disclosable summaries was also undertaken. The research also involved observations of court proceedings.

The quantitative data included national performance/monitoring data, a national survey of 202 defence solicitors, data on reasons for the continuation of intermediate diets in selected courts, detailed case trajectory data for a sample of summary cases in selected courts, and various costs associated with the processing of summary court cases.

Findings

The findings in context: changes to summary business

At the same time these reforms were being rolled out, considerable other changes were taking place in the summary system which affected the number and nature of cases which resulted in court action. Four key changes which occurred between 2007/08 and 2010/11 are of note: the proportion of summary business dealt with by police direct measures (DMs) has doubled – rising from 9% to 19% – and the proportion of business dealt with by Fiscal DMs and by Sheriff courts has decreased, each by 5 percentage points. Between 2007/08 and 2010/11, the overall number of Sheriff court complaints registered fell from 97,456 to 78,936. Much of this business was now being dealt with in the newly formed Justice of the Peace (JP) courts, former District courts with enhanced powers and now under the jurisdiction of the Scottish Court Service.

Case trajectories, outcomes and duration

Our estimates suggest that in the pre-reform period considered, 61% of all cases had a guilty plea offered at some stage in the proceedings. In the post-reform period this figure was almost identical at 60%.

However, since the reforms there has been an increase in the proportion of pleading diets with a guilty plea suggesting that more cases are now being resolved earlier in the process. These increases have been mirrored by decreases in conclusive intermediate diets and, to a lesser extent, trial diets. Custody cases, in particular, showed a significant increase in guilty plea rates at first calling; by June 2010, at

44%, the guilty plea rate at pleading diet for custody cases was almost double that of the pre-reform rate of 23%.

Following the immediate increase in early guilty pleas, there was a subsequent gradual decrease in these rates over time suggesting that the initial impact of the reforms is now receding.

The data suggests little or no improvement to the time taken to dispose of Sheriff summary cases despite an increase in early guilty pleas. 82% of cases were disposed of within 20 weeks in the pre-reform period compared with 71% in the most recent post-reform period. Neither has there been any notable change to the average number of diets per case. Given the significant shift in the nature of Sheriff court business – with a larger proportion of its workload now made up of more serious crimes and offences which may be more likely to cause complications – this is perhaps unsurprising. In addition, continuations without plea are now more common. Whilst these will increase the number of diets, where they secure a guilty plea they prevent the additional work involved in moving a case from pleading to intermediate diet.

The economic impact of the reforms

The economic analysis calculated the cost of processing a typical Sheriff court summary case pre-reform and post-reform. This analysis suggests that post-reform Sheriff summary cases cost an average of £405 (13%) less to process than pre-reform cases. If this average saving is applied to the 83,276 Sheriff summary cases processed in 2009/10, this suggests a total saving of £33 million when compared with the cost of processing that number of cases through the pre-reform system. However, the vast majority of this saving is because custodial sentences – the most expensive disposal - are less likely to be imposed post-reform whereas financial penalties – which are significantly cheaper to administer than custodial sentences – are more likely to be imposed post-reform. When costs associated with disposals are removed, there is almost no change to the system costs pre- and post-reform. Savings gained by earlier case conclusion are off-set by an increased proportion of those cases which go past ID going onto trial and an increased likelihood of adjournment.

There have been savings in expenditure on summary criminal legal assistance. The SCLA bill for Sheriff summary cases in 2009/10 was around £11 million less than the equivalent pre-reform figure for 2007/08. The majority of this saving has occurred from a lower volume of summary cases reaching court and therefore qualifying for legal aid rather than changes to SCLA payments introduced by SJR. However, some of the savings will also have occurred from the increase in the proportion of cases receiving ABWOR payments and the corresponding decrease in duty solicitor, advice and assistance, and summary criminal legal aid payments. This shift, at least in part, is attributable to the increase in earlier case disposal following the reforms. There is little to indicate that per case remuneration following the reforms is significantly different from the position pre-reform.

The operation of disclosure

Disclosable summaries were seen as useful to solicitors in advising their clients how to plead. Indeed, over 70% of defence solicitors in the survey thought that the information provided by disclosable summaries was either 'very helpful' or 'quite helpful' in this respect.

The quality of disclosable summaries was believed to be reasonably good and was improving. There were some suggestions from defence solicitors that summaries were of lower quality in complex cases, a position our analysis of a sample of summaries confirmed. Examination of outcomes for this sample tentatively suggests that those with an insufficient summary are less likely to plead guilty at first calling – given these are likely more complex cases, this is perhaps unsurprising.

Disclosure after the pleading diet appeared to be working reasonably well although experiences did vary between courts. Both the police and Fiscals commented on the additional resource demands which the revised arrangements placed on them. For some, this additional demand in combination with a perception of fewer resources gave the appearance that Fiscals were overburdened and under-prepared at intermediate and trial diets. Though some also noted that the perceived increase in prosecution workloads in preparation for IDs had to be set against the time saved by a greater number of earlier pleas.

Full statements and CCTV footage were perceived to be extremely helpful to the case. However, many commented on delays with this material. Indeed, data on the reasons for adjournments of intermediate diets suggests that disclosure issues were a common reason for adjournment. In addition, defence solicitors complained that, in some cases, material was disclosed too close to the intermediate diet to allow proper preparation and to advise the client; one or two Sheriffs shared this view.

Some interviewees believed that the Crown and Sheriffs were not pro-active enough in questioning unjustifiable – in the light of the disclosed information – not guilty pleas and requests for adjournments at the intermediate diet, with some calls for Sheriffs to be generally more 'assertive',

Impact on case preparation

60% of defence solicitors surveyed said there had been no change to their level of client contact since the reforms were introduced, around a quarter (24%) said their client contact had decreased, and 16% indicated an increase. Amongst those who said contact levels had changed, 51% attributed this to the changes to legal assistance, 14% to the disclosure reforms, and a further 27% perceived that both reforms have worked together to cause this change.

Defence solicitors were more likely to perceive a change in the way they *dealt* with clients than in the level of contact per se; half said the reforms had affected the way they deal with clients. Again, amongst those who noted a change, it was more commonly ascribed to the reforms to legal assistance than to the reforms to disclosure, though many referred to the combined effect of both.

For some solicitors, the reforms were seen to place more emphasis on seeking early resolution, a view which was also expressed by a number of Fiscals. However,

solicitors also pointed out that, as a result of changes to payments – and a perception, amongst some, that they are now worse off – they are more conscious of the type of work they take on, what preparation they will do, and will sometimes avoid certain work.

Reduction in client contact was not always viewed negatively; changes to disclosure have allowed client contact to be more focused for some solicitors, requiring less time to be spent in discussion with clients. For other solicitors, however, disclosure has required additional client contact which is not perceived to be financially viable following the changes to legal aid. In addition, both accused interviewees and defence solicitors perceived an impact on the quality of representation – for the former group this was measured through a reduction in the time spent with their solicitor before a case, for the latter group through financial changes restricting their ability to properly prepare a case.

The perception of lower per case remuneration was prominent in the comments of some solicitors but this perception does not appear to match the analysis of aggregate-level change in the value and mix of payments under SCLA which suggests that per case remuneration is much the same post-reform. It is clear that fewer summary cases now reach court though, providing less potential business for defence solicitors which may be impacting on their overall income – an outcome which has not occurred specifically as a result of the reforms to SCLA.

Impact on pleas, pleading advice and plea negotiations

Of defence solicitors surveyed, 42% thought that disclosure had led to more early discussions about cases with Fiscals, although 43% perceived there to have been no change and 14% were of the view that there was less discussion. A common view amongst interviewees was that discussions between Fiscal and defence were now more productive because both parties now had access to the same information. Accused interviewees also commented that disclosure, whether in full or in summary form, was essential not only in ensuring a just and fair process but also in helping clients and their solicitors decide on the best way to plead.

Some difficulties were raised in relation to discussion between defence solicitors and Fiscals. Defence solicitors remarked upon the difficulty of getting hold of a Fiscal as did Fiscals about solicitors. Measures established to address this – such as having a Fiscal available on court premises to discuss cases before the intermediate diet – had mixed responses, appearing to have been successful in some areas only.

To some extent, an imbalance between the high volume of cases going through some courts and the perceived low number of staff and lack of court time to deal with them was also believed to be constraining successful plea negotiations between solicitors and Fiscals. Some defence solicitors also believed that they will often be in a better position at trial diet to negotiate a better outcome for their client due to a perception that Fiscals were often under pressure to deal with a large number of trials and that witnesses may fail to attend.

The reforms were perceived by many interviewees and survey respondents to have had an influence on the increase in early pleas. For example, 38% of solicitors in the survey said they themselves were now more likely to advise an early guilty plea with

the figure higher when answering in relation to what they thought other solicitors did (57%).

Defence solicitors suggested that there is a greater readiness on the part of some lawyers to advise their clients to plead guilty in direct response to the financial arrangements of legal aid. In addition, many interviewees observed that the summaries were helpful in persuading clients to plead guilty at the earliest stage. However, for many practitioners, it was the combined effect of both sets of reforms which had contributed to the change in early guilty pleas.

Interviewees described a range of other factors which were perceived as influencing pleading decisions. These include: sentence discounting, particularly where a custodial sentence is at stake; bail opposition and the risk of being remanded; the shift in court business, Fiscal workloads and court scheduling; the perception that negotiation will gain more concessions for the defence at intermediate diet; a belief that there had been an increase in refusals of ABWOR by the Scottish Legal Aid Board (SLAB) after the case had been disposed of; whether or not Sheriffs adopt a pro-active approach in questioning not guilty pleas or reasons for adjournments; and the perceived likelihood, amongst accused and their solicitors, that the trial would ultimately go ahead as scheduled.

Conclusions

Interviewees believed the fairness of the system had improved in a number of respects: fewer trials overall meant more time to deal appropriately with cases which do go ahead and the requirement for victims and witnesses to attend court had reduced. Disclosure was fairer to accused persons because the information supplied better equipped them to make an informed and early decision about their case. However, there was a lack of consensus about the specific impact of the reforms to summary legal assistance and disclosure overall to the fairness of the summary justice system.

Interviewees believed the reforms to disclosure had contributed to a more efficient and effective system by facilitating early case resolution, better case preparation, earlier negotiations and productive discussions between the Fiscals and defence solicitors, and saving some time for both Fiscals and solicitors. Disclosure also allowed accused persons to make more informed and earlier decisions on how to plead.

However, some aspects of disclosure were seen to act negatively on efficiency and effectiveness. For example, Fiscals perceived an increase to their workload, associated with the administrative burden of full disclosure – which also had an impact on the police – outweighing any efficiency gains from other aspects of summary justice reform. In addition, despite improvements in meeting targets for post-pleading diet disclosure, it was still the cause of a significant amount of delay at intermediate diets, as was a lack of preparation.

Many of those interviewed emphasised that, despite the reforms to summary justice, not all cases will resolve as early as they perhaps could and may never do so. However, many suggestions were made to tackle the key barriers which may allow

that the progress towards achievement of the SJR aims so far is sustained and improved upon.

Improving efficiencies associated with online technology – such as the electronic processing of disclosure – and ensuring consistent timeous provision of CCTV and forensic evidence were believed to be key to reducing delay and improving preparation. The prospect of a sentence discount featured highly as a factor motivating early pleas. Thus ensuring the consistent application of discounts, or extending them, may have a greater impact on early pleas.

Witness attendance at trial diets was still a key cause of adjournment and the likelihood of trial adjournment was still a significant factor in the plea decisions made by accused persons. Thus maximising the attendance of witnesses would potentially impact on both these issues.

There is an important role for communication and effective inter-agency and personal relationships at a local level, factors which are not easily supported by centralised systems. There may be a greater role for the judiciary to promote and co-ordinate this local cooperation and efficiency.

1 INTRODUCTION

- 1.1 This report presents the findings of an evaluation of the changes to disclosure and summary criminal legal assistance (SCLA) introduced under Summary Justice Reform (SJR). This study, one of six evaluations commissioned by the Scottish Government Justice Directorate², was carried out by a research team led by the Scottish Centre for Social Research (ScotCen).
- 1.2 The overall aim of SJR – introduced in response to the review of summary justice by the McInnes Committee (Scottish Executive, 2004) – was ‘to create a more efficient and effective justice system which dispenses justice fairly and reduces re-offending’ (Scottish Executive, 2005). The aim was supported by four ‘overarching objectives’ aspiring to a summary justice system which is:
- Fair to the accused, victims and witnesses;
 - Effective in deterring and punishing offenders;
 - Efficient in the use of time and resources; and
 - Quick and simple in delivery.
- 1.3 The specific reforms to disclosure prior to pleading diet, introduced in October 2007, required that a summary of evidence (based on the police report submitted to the procurator Fiscal) would be provided to the accused along with the complaint in all summary cases³.
- 1.4 Whilst SJR did not change the existing processes of disclosure of evidence after the pleading diet, the System Model underpinning the reform of summary justice (Scottish Government, 2007) made a commitment to improving the effectiveness of court diets, including through improvements to disclosure of evidence following a plea of not guilty. The System Model defined a range of related timescales including, for example, within which police should provide witness statements to Fiscals and Fiscals should then provide them to defence agents. Disclosure following the pleading diet was considered within the scope of this evaluation.
- 1.5 The reforms to summary criminal legal assistance, introduced in June 2008, increased the levels of payment to criminal defence solicitors at the early stages of cases. In particular, for cases disposed of before trial, under the revised system the fixed fee for Assistance by Way of Representation (ABWOR) was increased (to £515), matching the revised summary criminal legal aid fixed fee also being paid for cases disposed of before trial. The

² Other aspects of the reforms subject to detailed evaluation are: direct measures (Richards *et al*, 2011); fines enforcement; lay justice; bail and undertakings; victims, witnesses and public perceptions; and Summary Justice System Performance. See Scottish Government (2009) for more information.

³ The subsequent creation of a statutory duty of disclosure under the Criminal Justice and Licensing Act 2010 does not alter this.

reforms also allowed for ABWOR to be provided by an accused person's own solicitor for the former's appearance from custody as well as extending it to cover continuations without plea (CWP). Criminal Advice and Assistance (A&A) fee rates were increased by 10% with such fees now being subsumed within any subsequent grant of ABWOR or summary criminal legal aid (excluding an exceptional police station visit). Duty solicitor payments were also changed.⁴

Aims and objectives

- 1.6 The overarching aim of this evaluation was to assess the extent to which the reforms to legal aid and disclosure supported: the overall aim for SJR; the SJR overarching objectives; the SJR intended outcomes; and the specific policy objectives of the reforms to SCLA and those of disclosure. Specifically, the evaluation sought to reveal whether the reforms to SCLA and disclosure have resulted in: fewer cases going to trial needlessly whilst maintaining the principle of fairness; those cases which go to trial getting there quicker; cases being dealt with at the earliest possible stage in proceedings; cases being better prepared; and more effective court hearings.
- 1.7 In addition, the research explores the economic impact of the reforms on the resources available to different parts of the justice system; that is, the value of any savings or costs incurred as a result of the reforms, and whether any such savings or costs incurred by different parts of the system counteract or augment each other.
- 1.8 A further, and important, key objective of the broader evaluation was to separate out the individual impact of the two reforms on the overall aim, and overarching objectives, of SJR.

Methods

- 1.9 The evaluation employed both quantitative and qualitative methods to explore the practice and operation of disclosure and SCLA following the reforms, perceptions of the reforms among key actors involved in the summary justice system, the impact of the reforms on case trajectories and outcomes, and the financial impact of the reforms.
- 1.10 A detailed account of the research methods can be found in Appendix C. In summary, qualitative data were collected via individual face-to-face or telephone interviews with three main audiences:
 - national level representatives of key **stakeholder** organisations
 - 36 criminal justice professionals associated with four case study Sheriff courts (**interviewees**)⁵

⁴ A more detailed overview of the main changes to summary criminal legal assistance introduced by the reforms is available in Appendix D.

⁵ These included Sheriffs, court clerks, depute Fiscals, defence solicitors and senior police officers. The court locations are not disclosed for reasons of confidentiality.

- 16 individuals who had been accused of summary crimes or offences (**accused**).
- 1.11 The four case study courts were selected to include those where there appeared to have been a high impact from the reforms (measured in terms of the change to the rate of early guilty pleas) and those where there had been less impact. The case study qualitative interviews sought to explore whether the practice and behaviours of participants in the local criminal justice system could explain some of the differences in impact of the reforms.
 - 1.12 A random sample of 192 disclosable summaries (approximately 50 from each of the four case study courts⁶) provided by the Crown Office and Procurator Fiscal Service was rated by the research team in terms of providing sufficient information to the defence to enable them to advise their clients on how to plead.
 - 1.13 The above qualitative data were considered alongside observations of court proceedings and a number of quantitative measures. They included existing national performance/monitoring data, a national survey of 202 defence solicitors, data on reasons for the continuation of intermediate diets in selected courts, case trajectory data for the sample of cases selected for the analysis of disclosable summaries, and data relating to the costs of various activities associated with the processing of summary court cases.
 - 1.14 The research focussed on summary business in the Sheriff rather than Justice of the Peace (JP) courts, so it complements rather than repeats issues which may be raised in the evaluation of reforms to Lay Justice which is centred on the JP courts. It is possible that the reforms to SCLA and disclosure may have impacted differently on these different summary settings.

Limitations of the evaluation

- 1.15 There are a number of limitations to the current study – particularly in relation to its ability to assess the direct impact of the reforms.
 - The reforms have occurred alongside widespread change in the Scottish criminal justice system including, in particular, the unification of the Sheriff and District (now JP) courts under the single jurisdiction of the Scottish Court Service (SCS), the move to deal with a larger proportion of summary business using non-court disposals (police and Fiscal DMs) and the resulting impact on court business.
 - The changes to SCLA and disclosure introduced by the reforms both impact mainly on the same stage of the summary justice process – the pleading diet. As such, it is difficult to disentangle their independent effects from each other and from the numerous other ongoing issues and developments in the summary process such as, for example, sentence

⁶ Only 42 cases were provided in relation to one court.

discounting, further reduction in the fixed fee and the impact of HMA v. Cadder.

- Whilst a range of comparable data are available for the pre-reform period, there are major problems of attribution because of the potentially confounding effects of change elsewhere in the system.
- The qualitative element of the evaluation reflects stakeholder perceptions of experiences and impacts of the reforms. Such views are, of course, subjective, sometimes contradictory and often in tension with those of others. But they remain of interest in their own right, since they inform and help to explain the way that individuals may engage (or fail to engage) with systems and with other people working within them.

Structure of the report

- 1.16 In the following chapter, we provide some contextual information about the background to the reforms and the nature of the post-reform summary justice system. Chapter 3 uses administrative data to describe key changes in the volume, character and procedural outcomes of summary court business following the reforms. Chapter 4 focuses on key actors' perceptions of how the reforms have shaped defence solicitors' case preparation and plea decision-making. As such, it focuses largely on reactions to the changes to summary criminal legal assistance, but also looks at the interaction of these with changes to disclosure. Chapter 5 takes a wider look at views of the changes to disclosure: it provides an analysis of the content, use and perceived impact and effectiveness of disclosable summaries as well as considering perceived developments in and issues with disclosure after the pleading diet. Chapter 6 considers the way that other factors associated with summary justice reform have shaped the impact of the specific reforms to legal aid and disclosure. The final chapter considers the extent to which the reforms have achieved their specific objectives, explores their contribution to the broader aims of summary justice reform and offers some brief conclusions.

2 BACKGROUND TO THE REFORMS

2.1 Recent years have seen a raft of changes to summary criminal justice in Scotland. These changes have been wide-ranging and occasionally contentious, but they have also often been technically complex and difficult for 'lay' members of the public to understand. This chapter briefly explains the changes to summary criminal legal assistance and disclosure and looks at key stakeholder reactions to and understandings of the reforms and what they were intended to achieve.

Changes to summary criminal legal assistance

2.2 The McInnes Committee argued that the payment structure under the legal aid system had the effect of encouraging late guilty pleas. The resulting revised system, which came into force on 30 June 2008, increased levels of payment to criminal defence solicitors at the early stages of cases and, specifically, introduced a case disposal fee (£515) for Sheriff Court/ Stipendiary Magistrates work to cover ABWOR (Assistance by Way of Representation) and summary criminal legal aid cases disposed of before trial. The reforms also allowed for ABWOR to be provided by an accused person's own solicitor for the former's appearance from custody. As well as supporting the higher level objectives of SJR, these changes to summary criminal legal assistance were specifically intended:

- To ensure that solicitors are appropriately and fairly paid for the work they do;
- To support investigation and preparation of cases to facilitate their resolution at the earliest possible stage;
- To reduce bureaucracy where possible and appropriate;
- To support the availability and delivery of sufficient criminal defence services of an appropriate quality;
- To appropriately reward work undertaken to progress summary criminal cases and support the cost effectiveness and efficiency of the wider criminal justice system.

Changes to disclosure

2.3 The McInnes Committee also argued that delays in summary justice resulted from the relatively late stage at which the defence had sufficient information to reach a conclusion as to what plea should be offered and to advise clients accordingly. The reforms to disclosure introduced the provision to the accused – in all summary cases in advance of the pleading diet (PD) – of a 'summary of evidence' based on the police report submitted to the procurator Fiscal. The subsequent creation of a statutory duty of disclosure under Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 has no bearing on the provision of the summary of evidence to the accused at this very early stage of the prosecution process.

- 2.4 The idea of the summary was that it would allow earlier investigation of the case by the defence, and reduce duplication of evidence-gathering. It was also envisaged that it would facilitate early decision-making between defence solicitors and their clients and discussion between defence and prosecution. By enabling earlier identification of the evidence agreed by both defence and prosecution, it would reduce the number of witnesses cited unnecessarily.
- 2.5 The specific policy objectives of the reforms to disclosure prior to pleading diet were:
- To provide the defence with a basis for early investigation of the case and discussions with the procurator Fiscal;
 - To inform the decision making process with the client regarding the plea which ought to be entered;
 - To support more effective court hearings at pleading and intermediate diet;
 - To enable cases to be dealt with at the earliest possible stage in proceedings;
 - To support the new system model for summary justice.
- 2.6 Whilst SJR did not change the existing processes of disclosure of evidence *after* the pleading diet, the overarching System Model underpinning the reform of summary justice (Scottish Government, 2007) contained statements about the need to improve the effectiveness of court diets, and the procedures and practices around disclosure of evidence following a plea of not guilty can be seen to contribute directly to early, effective preparation for court diets. In addition, the System Model contains aspirations regarding appropriate timescales for the provision of witness statements by the police to Fiscals (within 28 days of the accused pleading not guilty), along with timescales within which Fiscals should work to consider these statements and provide them to defence agents (up to a possible 28 days before the intermediate diet).

Stakeholder views of the reforms

- 2.7 So how did those working within the summary justice system view the reforms? Was there a common understanding of the need for change and of how the reforms fitted into the wider programme of summary justice reform?
- 2.8 Interviews with senior staff from stakeholder agencies and organisations (see Appendix C for details) were conducted at an early stage of the study to examine perceptions of the reforms and draw out key themes which would inform the subsequent qualitative interviews. In these early interviews, there was widespread agreement that, pre-reform, the summary justice process had been slow and that there was constant 'churn' - that is, that cases were repeatedly adjourned, leading to long delays in final outcome and disposal. The representative of the Association of Chief Police Officers in Scotland

(ACPOS) noted, for example, that “it was often said that it was anything but a summary justice system” [ACPOS Official, stakeholder interview] and highlighted the amount of police time lost to witness duty for trials which did not proceed. For the Scottish Legal Aid Board (SLAB), the reforms were also about trying to “put the summary back into summary justice” [SLAB Official B, stakeholder interview]. The same interviewee argued that the system had become “too weighted to ‘not guilty’ pleas and potentially going to trial” and that “we redressed the balance there” through the reforms.

- 2.9 From the perspective of the Crown Office and Procurator Fiscal Service (COPFS), prior to the reforms, the defence had faced three main problems: lack of information; lack of access to the Fiscal; and the structure of legal aid. Reforms to disclosure were seen as tackling the first two of these, permitting meaningful discussion between solicitor and client, and between solicitor and Fiscal. For ACPOS, disclosure was about addressing the “total ignorance” of defence agents when a case was being called:

All they would receive was the complaint, and they would have no context, no background or whatever, other than the charge and the accused's version of events [ACPOS, stakeholder interview].

- 2.10 In short, then, the need for and the logic of both sets of reforms seemed widely understood by senior practitioners within key stakeholder agencies. And these interviewees also shared an understanding that the reforms were part of a wider shift in policy thinking towards a more holistic, system-wide approach to understanding and reforming practice. For example legal aid officials noted the importance of an integrated approach to policy, of which legal aid formed an important part:

[Research] suggested that changing one part of the system and not another would be unlikely to be fully effective, but if you do both at the same time, pointing in the same direction, then they'll reinforce each other and they're more likely to succeed, in the sense of achieving what it is you [want] to achieve. [SLAB Official A, stakeholder interview]

- 2.11 As such, the reforms were viewed as being a good example of the various justice agencies working together to bring about mutually beneficial change

It was the first time I think that there had been a set of reforms involving lots of organisations all making changes for the same [...] goal. [COPFS, stakeholder interview]

- 2.12 The combination of disclosure with legal aid reform was felt to be potentially crucial:

When the two things come together, looking at the summary justice system and seeing how other factors within the system might be addressed that also encourage, you know, getting in and then carrying on until you reach the point where a plea might be changed or otherwise the cases resolve [SLAB Official A, stakeholder interview].

- 2.13 But it was recognised that other elements of the process, such as sentence discounting⁷, also had a potentially important role to play in encouraging early guilty pleas:

That's a factor. It's a factor that's often forgotten in this [...] it's up there with the other factors of disclosure, informed decision-making, ability to prepare, [...] and get information at the beginning of the case [SLAB Official B, stakeholder interview].

[...] it did dovetail well with disclosure because of course we had the Fiscal summaries coming in, and it dovetailed well with Du Plooy⁸ because there was [...] a merit for the client's point of view in pushing the idea of an early disposal of the case [Defence Solicitor Representative D, stakeholder interview].

⁷ The practice of discounting or reducing sentences for pleas of guilty, especially early pleas.

⁸ In the case of *Du Plooy v HM Advocate* the High Court gave clear approval to a more explicit scheme of sentence discounting than had earlier been the case.

3 ANALYSIS OF MONITORING DATA RELATING TO THE REFORMS

- 3.1 We have already noted that the reforms to legal aid and disclosure were part of a much wider programme of reform of summary justice in Scotland. This chapter uses monitoring data from the Scottish justice agencies to try to understand what effect, if any, the reforms may have had within this rapidly changing environment. Two main types of analysis are presented here. The first simply describes the changes in the volume and character of cases passing through the summary justice system. The relevance of this is that case type, in itself, is a key predictor of procedural outcomes (such as late guilty pleas and delay) and so changes in the nature of the courts' workload may confound any other impacts resulting from the specific reforms being examined as part of the evaluation.
- 3.2 The second type of analysis looks at changes in case trajectories and outcomes and, in particular, at the likelihood of early conclusion. It does so through consideration of changes in a number of key indicators over the period covered by the two sets of reforms. As the changes to legal aid and disclosure did not take place at exactly the same time, there is some scope to identify changes potentially associated with each by examining such trends.
- 3.3 The chapter argues that the changes to SCLA and disclosure need to be set against the backdrop of very significant change in the work of the summary courts, resulting in large part from the marked increase in the use of Direct Measures. Although there have also been important changes in the volume and type of legal assistance issued, there is little to indicate that per case remuneration following the reforms is significantly different from the position pre-reform.
- 3.4 It will also show that case trajectory data suggest that, following the reforms, a greater proportion of Pleading Diets have guilty pleas offered and are conclusive – in other words, that cases are now being resolved earlier. Importantly, though, the chapter will also show that this does not seem to have led to a significant change in the overall plea rate. There is also some evidence that unnecessary churn has been reduced and that cases are being resolved at earlier stages in the process, but little evidence that the average time taken to resolve cases has been reduced.

Examining the changes to court business

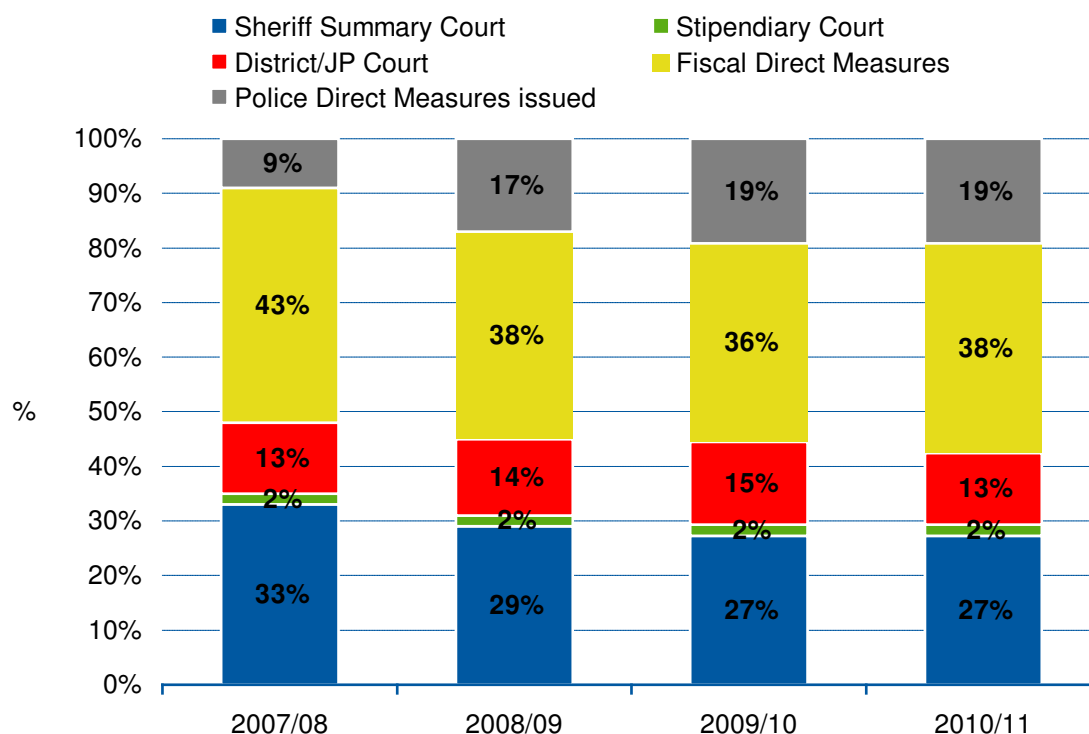
- 3.5 As the reforms to legal aid and disclosure made changes only to those criminal cases which reach the summary courts, it is important to consider the wider changes introduced by SJR which have affected the number and nature of cases resulting in court action. In particular, it is important to understand changes in the volume and make up of Sheriff Court business since this appears to have had a significant impact on aggregate indicators of how cases are handled.

- 3.6 The key factor here has been the extension of the range of alternatives to prosecution or Direct Measures (DMs) that can be offered to an alleged offender by the police and Procurators Fiscal. Since the introduction of these, there have been sizeable reductions both in the number of cases submitted by the police to COPFS and in the number of cases that result in court proceedings (for detail on the changes introduced to DMs by SJR and their corresponding impact on summary business see the report on the evaluation of reforms to DMs: Richards *et al*, 2011).
- 3.7 Under SJR, the administration of the District courts was transferred from the 32 individual local authorities to the Scottish Court Service with these courts re-named Justice of the Peace (JP) courts in the process. SJR also introduced a number of other changes to the functions, powers and workload of JPs. Some of these changes were direct – for example, extending the powers available to JPs. Others were indirect, such as the increased availability of DMs which resulted in more minor offences being dealt with out of court, leaving JPs to deal with cases of a different, and generally more serious, nature than prior to reform.
- 3.8 The ‘unification’ process, which involved the formal transfer of responsibility for JP courts to SCS, took place at different times in different Sheriffdoms during the period between March 2008 and February 2010. As a result, the data landscape is highly uneven. Data on the complaints registered for JP courts are only available following unification. As such, although full national data (and data for all Local Criminal Justice Boards (LCJBs)) are available for 2010-11, comparable data for the previous year is only available for seven LCJB areas and there are no earlier full year data available other than for Lothian. The possibilities for trend analysis in relation to JP court business are, therefore, limited.

Summary of changes to summary business distribution

- 3.9 Figure 3-A provides an overview of the proportion of summary business dealt with via the various routes discussed above and how this has changed since SJR was rolled out. The main story here is the doubling in the proportion of summary business dealt with by police DMs, from 9% in 2007/08 to 19% in 2010/11. At the same time, the proportion of business dealt with by Sheriff courts and by Fiscal DMs has decreased, each by 5 percentage points.

Figure 3-A Distribution of summary business 2007-08 to 2010-11



Source: CJB MIS Dashboard, Chart 2, 'Overall Business Distribution'. Note that these data are based on fiscal first markings.

Use of police and Fiscal direct measures

3.10 Table 3.1 provides a more detailed summary of each of the main elements illustrated in Figure 3-A and includes, where data was available, a longer comparison, going back to 2006/07. The first thing to note is the sizeable reduction in the overall number of SPRs (Standard Prosecution Reports) submitted. This decrease corresponds broadly with an increase in the use of police DMs, also shown in the table and as reported in the evaluation of DMs (Richards et al, 2011).

Table 3.1 Changes to key summary justice business elements, 2006-07 to 2010-11

Indicator	Year					Change to 2010-11*	
	2006-07	2007-08	2008-09	2009-10	2010-11	No.	%
No. of Police DMs issued	-	19331	53021	60477	56570	37239	293
No. of SPRs submitted by police to COPFS**	290742	282419	258948	247618	236307	-54435	-19
No. of cases marked Fiscal DMs	130019	126175	116761	111288	109213	-13984	-11
No. of summary complaints registered in JP courts***	-	-	-	50813	47118	-3695	-7
No. of summary complaints registered in Sheriff courts	106226	97456	89667	83276	78936	-27290	-26

*Change is measured between the earliest year for which data was available and 2010-11.

**A proportion of SPRs submitted will be marked by the Fiscal as 'No Proceedings – Further Action Disproportionate'. As such, the total number of SPRs will not equal the combined number of cases marked for DMs and for court.

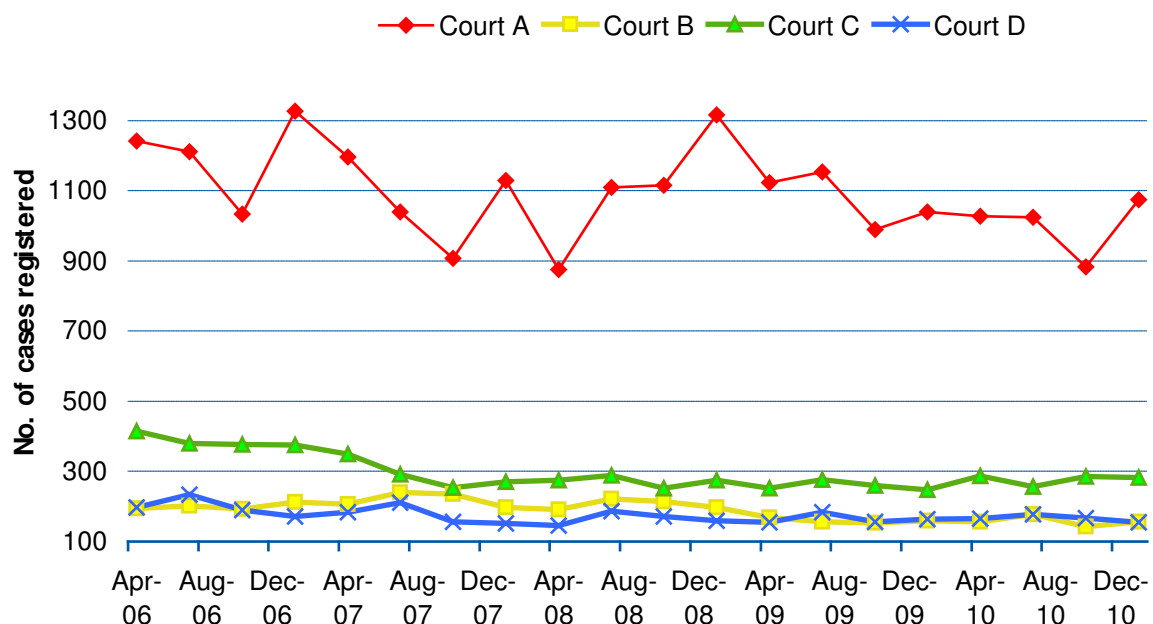
***This is partial data; data on complaints registered in JP courts are only available from the point of unification. The first Sheriffdom (Lothian & Borders) was unified in March 2008. Prior to 2009-10 too few Sheriffdoms were unified to allow consideration of change in case numbers.

Complaints registered in JP/district and Sheriff courts

- 3.11 Table 3.1 also shows the total number of JP court complaints registered in 2009-10 and 2010-11 for those areas which had full data for both years. Data on the *nature* of offences dealt with in the JP courts are included in Figure A.3 in Appendix A. The most significant change has been the increase in the proportion of JP court business concerned with motoring offences, rising from 45% in 2007-08 to 69% in 2010-11. Over the same period, there has been a corresponding decrease in the extent to which JP court business is concerned with 'Other' offences and breach of the peace and, though to a lesser extent, drugs offences and vandalism⁹.
- 3.12 Not surprisingly, the various changes to summary procedure have also had an impact on the number and nature of cases being dealt with in the Sheriff courts (also shown in Table 3.1).
- 3.13 These reductions in the volume of Sheriff court business are also reflected at individual court level in the four case study Sheriff courts (as shown in Figure 3-B). Proportionately, Court C has recorded the largest decrease, of 28% since 2006/07, followed by Court B at 21%. Court D and Court A saw similar reductions of 16% and 17% respectively. Interviewees working in Court C commented on the proportion of business now being dealt with by DMs and that this court was different to others in that respect. This perception fits the larger decrease in Sheriff complaints in this court.

⁹ See Figure A.3 in Appendix A

Figure 3-B Number of Sheriff court complaints registered in selected courts 2006-07 to 2010-11



3.14 As in JP courts, there has also been a change in the types of offences considered by the Sheriff courts.¹⁰ On the whole, Sheriff courts deal with a more varied range of offences than do JP courts – no single offence type dominates proceedings in the same way that motor vehicle offences constitute the majority of JP court business. Indeed, the key change in the type of offences considered by Sheriff courts has been the reduction in the extent to which motor vehicle offences form part of Sheriff court business – decreasing from 25% in 2008/09 to 14% in 2010/11. The removal of these offences sees crimes against public justice, drugs offences, simple assault and ‘other’ crimes and offences each constituting a larger part of Sheriff court business.

3.15 The analysis of case trajectories and outcomes which follows below indicates that these changes to Sheriff court business seem to have had a significant impact on the aggregate picture of how cases are handled. In particular, although a higher proportion of cases plead guilty at pleading diet (PD), Sheriff summary cases are less likely to conclude within 20 weeks post-reform than they were pre-reform (see paragraph 3.52). There is also no evidence that they have significantly fewer callings, post-reform (see paragraph 3.59).

Grants of criminal legal aid and average case payments

3.16 The large reduction in the volume of summary business being dealt with in court has been accompanied by a similarly significant shift in the level and types of legal assistance issued. The SJR monitoring data also permits consideration of changes to the nature of grants made of SCLA between 2007-08 and 2010-11. These data are summarised below.

¹⁰ See Figure A.4 in Appendix A.

Table 3.2 Number of criminal legal aid grants and applications, 2007-08 to 2010-11

Indicator	Year				Change to 2010-11	
	2007-08	2008-09	2009-10	2010-11	No.	%
No. of grants of advice and assistance	104220	52065	27864	27545	-74471	-73%
Duty solicitor appearances (including PDSO)	36041	29017	21036	18272	-17769	-49%
No. of grants of ABWOR*	11944	32917	38951	35495	23551	197%
No. of grants of summary criminal legal aid	75582	59416	55882	50633	-24949	-33%
Total grants of ABWOR and summary criminal legal aid	87526	92333	94833	86128	-1398	-2%
% of ABWOR and summary criminal legal aid grants which are:						
ABWOR	14	36	41	41	-	-
Summary Criminal Legal Aid	86	64	59	59	-	-
Average case costs						
Advice and assistance	69	67	52	55	-14	-20%
ABWOR*	185	419	507	540	355	192%
Summary criminal legal aid	646	659	642	653	7	-1%

Source: Scottish Legal Aid Board Annual Report 2010-2011, Key Statistics 2006-2011

*ABWOR grants made for breach proceedings (where there is no summary complaint) have been removed from these figures.

3.17 Overall, and including duty solicitor payments, the number of grants of criminal legal assistance have reduced by 40% from around 233,000 in 2007-08 to around 139,000 in 2010-11. More specifically, grants of criminal advice and assistance (A&A) and SCLA have decreased by around three-quarters and one third respectively, whereas grants of ABWOR have more than doubled.

3.18 At least some of the decrease in grants of A&A reflects a transfer of many of these cases to ABWOR status or the fact that they have been subsumed into a subsequent grant of summary criminal legal aid. A key change to legal aid introduced by SJR was that where A&A is initially granted, it will be subsumed within any subsequent grant of ABWOR or summary criminal legal aid. Previously, a case may have received a grant of A&A and a further, separate, grant of ABWOR or summary criminal legal aid. In contrast, grants of ABWOR and summary criminal legal aid are mutually exclusive. Considering these two grants together, the data show that the total *number* of grants made changed little between 2007-08 and 2010-11. However, the proportion of the two grants has moved from 14% ABWOR and 86% summary criminal legal aid to 41% and 59% respectively. This largely reflects the increase in the

proportion of cases with early guilty pleas which will be illustrated below and which qualify for the revised ABWOR case disposal fee.

- 3.19 Also shown in the table are the changes to average case costs (to SLAB) for each of the three main types of SCLA. As the data show, average costs for summary criminal legal aid cases have fluctuated a little during the period considered but have remained between £640 and £660. Average costs for A&A have decreased by around £14 whereas the average costs for ABWOR have more than doubled from £234 in 2007-08 to £499 in 2010-11.
- 3.20 So there is little to indicate, from these data, that per case remuneration following the reforms is significantly different from the position pre-reform. Despite this, as the discussion in Chapter 4 will show, many defence solicitors nevertheless believe that the reforms have placed restrictions on them financially and that these restrictions are impacting on solicitor behaviour and the quality of representation. The data on the distribution of summary business, shown in Table 3.1, indicates that fewer cases are now reaching court, suggesting a smaller pool of potential business available for defence solicitors. This suggestion is supported, to some extent, by the economic analysis discussed in paragraphs 3.74 to 3.79, which shows that there has been a reduction in spending on legal aid since the reforms, largely as a result of the reduction in the number of court cases. It may be this general reduction in the level of business, rather than changes to individual case costs, which are influencing such perceptions amongst defence solicitors.

Case trajectories and outcomes

- 3.21 The second stage of analysis of monitoring data is mostly concerned with addressing the contribution of SCLA and disclosure reforms to the achievement of the overall aim of SJR and the following more specific outcomes and objectives:
- Cases being dealt with and resolved at the earliest possible stage in proceedings
 - More effective court hearings at pleading and intermediate diet (avoiding unnecessary delay).
- 3.22 Most of the KPI data relevant to the analysis of SCLA and disclosure is available as monthly counts from April 2006. To consider the impact of the changes to SCLA and disclosure on case trajectories and diet outcomes, a series of average monthly plea rates – based on the proportion of diets held each month which resulted in a guilty plea - was calculated for each of the KPIs used. These average rates correspond to the following periods:
- The period prior to the introduction of the disclosure reforms (April 2006 to September 2007);
 - The period between the introduction of the disclosure reforms and the introduction of the legal aid reforms (October 2007 to June 2008);

- The first year after the legal aid reforms were introduced (July 2008 to June 2009);
- The second year after the legal aid reforms were introduced (July 2009 to June 2010);
- The first three quarters of the third year after the legal aid reforms were introduced (July 2010 to March 2011).

3.23 By considering the data in this manner we can tentatively examine: first, the impact of changes to disclosure (prior to the introduction of the legal aid reforms); second, the impact of changes to disclosure in combination with subsequent changes to legal aid; and third, whether any change which appears to have resulted from the reforms has been sustained and whether outcomes and trajectories have stayed the same post-reform or continued to change.

3.24 As data were not available from JP/District courts prior to unification, it is not possible to compare pre- and post-reform rates on these indicators.

Summary of change in diet outcomes over time

3.25 An overview of the changes to diet outcomes for Sheriff summary cases between April 2006 and March 2011 is provided in Table 3.3. The table displays the average proportion of all Sheriff court diets at which a guilty plea was made, or the diet was 'conclusive' – that is, the case did not proceed beyond that diet – in each of the key analytical periods.¹¹

Table 3.3 Sheriff court diets with guilty pleas or other conclusive outcome during key analytical periods from April 2006 to March 2011 (%)

Stage and outcome	Average % cases with outcome during period				
	Pre-reform	Disclosure reform only	Disclosure plus Legal Aid reform – Year 1	Disclosure plus Legal Aid reform – Year 2	Disclosure plus Legal Aid reform – Year 3 (first 9 months only)
	Apr 06 to Sep 07	Oct 07 to Jun 08	Jul 08 to Jun 09	Jul 09 to Jun 10	Jul 10 to Mar 11
% of PDs with guilty plea	22	24	35	33	31
% of IDs with guilty plea	19	19	15	14	13
% of TDs with guilty plea	28	29	25	23	22
% of conclusive PDs	24	26	33	35	33
% of conclusive IDs	27	26	21	19	19
% of conclusive TDs	62	63	57	57	57

Note: *PD = Pleading Diet, ID = Intermediate Diet, TD = Trial Diet.

¹¹ The figures actually refer to the proportion of accused appearing at the various diet types for which the outcome of the diet in court was either pled guilty (for the guilty plea rate) or pled guilty, not guilty plea accepted, or not called/deserted (for the conclusive rate). Whilst multiple accused may appear at a single diet, for ease of reference, we have referred to 'diets' rather than 'accused'.

Column percentages will not equal 100 as the figures refer to the proportion of each diet type with a guilty plea and not the stage a guilty plea was offered for all cases.

3.26 The data in Table 3.3 illustrate a number of notable trends. First, there has been an increase in the proportion of PDs at which a guilty plea is made. These increases have been mirrored by decreases, in particular, in guilty pleas at intermediate diet (ID) and at trial diet (TD). Although these data refer to diets, rather than cases, the implication is that, as a greater proportion of PDs have guilty pleas offered and are conclusive following the reforms, cases are now being resolved earlier. Further discussion of these trends follows below.

There is a limitation to the data in Table 3.3 in that each row refers only to the outcomes for diets at each individual stage. It therefore does not present a picture of how the overall spread of guilty pleas given across PDs, IDs and TDs has changed following the reforms, though the data does indicate that a higher proportion of guilty pleas are now being made earlier. An alternative analysis was undertaken by SLAB to explore this overall change. The SLAB analysis calculated the proportion of all guilty pleas in the pre- and post-reform periods which occurred at PD, ID and TD. The results are shown in Table 3.4. The results show that, nationally, the proportion of all guilty pleas that occur at PD (as opposed to at a later stage) increased from 37% in the initial pre-reform period to 52% in the latest post-reform period. The proportion of guilty pleas that occur at ID and TD has fallen, though more so at ID. The main benefit of the increase in guilty pleas at PD therefore, has been a reduction in pleas at ID, rather than at trial. This is similarly suggested by the greater change in conclusive IDs than TDs in Table 3.3. Whilst the individual numbers in the two tables are different, the trends are almost identical. In other words, they each represent an approximately 40% increase in guilty pleas at pleading diet.

Table 3.4 Percentage of all guilty pleas which occurred at each diet stage during key analytical periods from April 2006 to March 2011

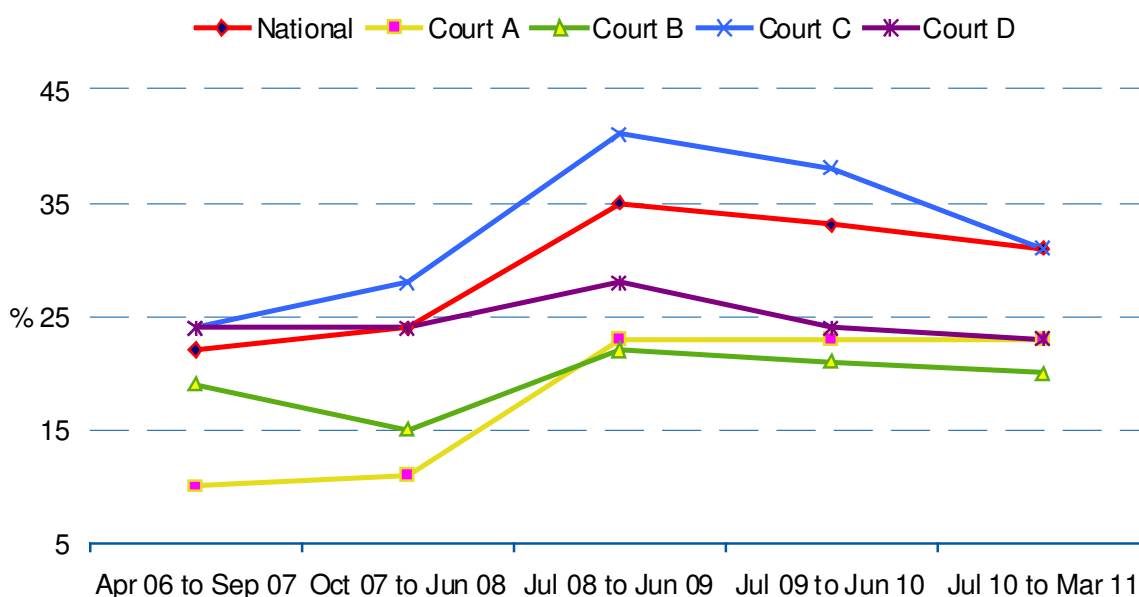
Stage	% of guilty pleas in period which occurred at corresponding diet stage				
	Pre-reform	Disclosure reform only	Disclosure plus Legal Aid reform – Year 1	Disclosure plus Legal Aid reform – Year 2	Disclosure plus Legal Aid reform – Year 3 (first 9 months only)
	Apr 06 to Sep 07	Oct 07 to Jun 08	Jul 08 to Jun 09	Jul 09 to Jun 10	Jul 10 to Mar 11
Pleading Diet	37	36	53	53	52
Intermediate Diet	36	35	25	24	24
Trial Diet	27	29	22	23	24

Note: *PD = Pleading Diet, ID = Intermediate Diet, TD = Trial Diet.

Pleading diets

- 3.27 As noted above, the data in Table 3.3 indicates an overall increase in the proportion of conclusive PDs. A slight increase, from 24% to 26%, initially followed the introduction of the disclosure reforms with a more substantial jump to 33% in the year following the legal aid reforms. This rate continued to increase over the following year but dipped again in the most recent data.
- 3.28 The vast majority of conclusive PDs take the form of a guilty plea. Aggregate data for all Sheriff courts indicate that following the reforms to disclosure there was a small increase in the proportion of PDs with a guilty plea, rising from 22% to 24%. This increased further in the year following the changes to legal aid, when both reforms were fully rolled-out, with the rate rising to 35%.
- 3.29 Although the post-reform rate remains above the pre-reform rate, the initial 'high' of 35% has not been sustained, with national rates of PDs with a guilty plea in subsequent years decreasing to 33% and 31%.
- 3.30 Pre-reform, the likelihood of a guilty plea at PD varied by court – it was most likely in Courts C and D (at 26% of PDs in both cases) and least likely in Court A (11% of PDs). The initial increase to the rates following the changes to disclosure occurred in 3 out of the 4 courts. However, each court saw a rise in guilty plea rates at PD in the year after the changes to SCLA, with some increases larger than others. In Court C (which had an initially high rate) and Court A (which had an initially low rate) for example, the increase was of 13 and 12 percentage points respectively. In Court B there was a increase of 7 percentage points, in Court D an increase of just 3 percentage points. Interviewees in Court C attributed at least some of this change to an agreed pro-active approach amongst Sheriffs where the overarching aims of SJR were recognised, unnecessary delay was not tolerated and sentence discounting was prominent. The more muted changes in Court D were, according to some interviewees in that court, attributed to a resistance to the reforms amongst some practitioners stemming from a belief that the reforms did not support proper investigation of summary cases.
- 3.31 It is notable that following the initial increase in guilty plea rates, there has been a subsequent gradual decrease in these rates over time. Indeed, the decrease in rates in Court D means that in the most recent period, the guilty plea rate has dropped back to pre-reform levels. These trends suggest that the initial impact of the reforms on early guilty pleas is receding.

Figure 3-C % of Sheriff Court cases with guilty plea at PD over time, by court



3.32 Between April 2009 and March 2011, 68% of SPRs submitted to COPFS were cited, 23% were placed in custody and 9% were on undertaking. Pre-reform figures are not available. However, this split has not changed over the different post-reform periods for which data is available¹². Some differences are apparent in the rate of guilty pleas by appearance type as shown in Table 3.4. Whilst in the pre-reform period, custody cases were least likely to have a guilty plea at PD, following the reforms these cases were most likely to have guilty pleas offered. Indeed, by June 2010 the guilty plea rate for custody cases of 44% was almost double that of the pre-reform rate of 23%. Whilst rates for cited and undertaking cases also increased, neither saw a change as significant as that observed for custody cases. The qualitative data, which will be discussed in Chapters 4, 5 and 6, suggests this difference is shaped not only by the reforms to disclosure and SCLA but also by the impact of sentence discounting and the Crown's position on bail in custody cases.

Table 3.4 % of Sheriff court PDs which had a guilty plea over time by type of appearance

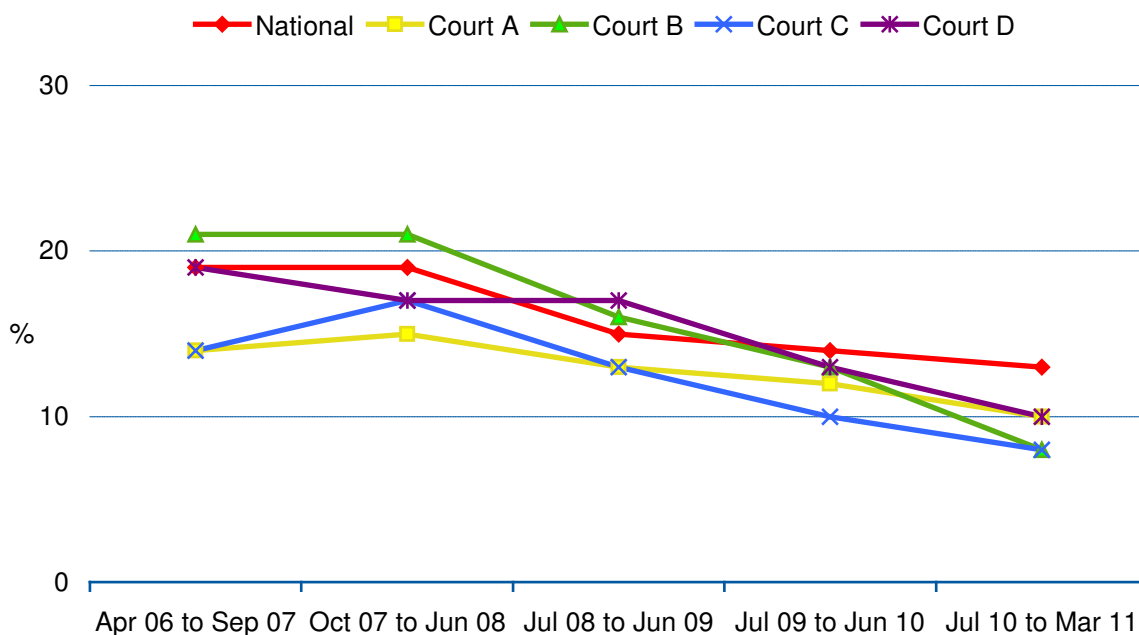
	% of PDs of particular appearance type with guilty plea in period			
	Pre-reform (Apr 08 - Jun 08)	Jul 08 to Jun 09	Jul 09 to Jun 10	Jul 10 to Mar 11
Cited	28	33	37	38
Undertaking	28	36	34	30
Custody	23	40	44	43

- 3.33 Alongside the increase in guilty pleas, another notable shift in pleading diet outcomes has been an increase in continuations without plea (CWP). In the pre-reform period, 10% of PDs were continued without plea compared with 22% in the most recent post-reform period. Some increase in CWPs was expected following SJR; these permit defence solicitors more time to discuss the disclosable summary with their client potentially securing an appropriate guilty plea and preventing an unnecessary not guilty plea with the case then moving to ID and the additional work this sets in motion.

Intermediate diets

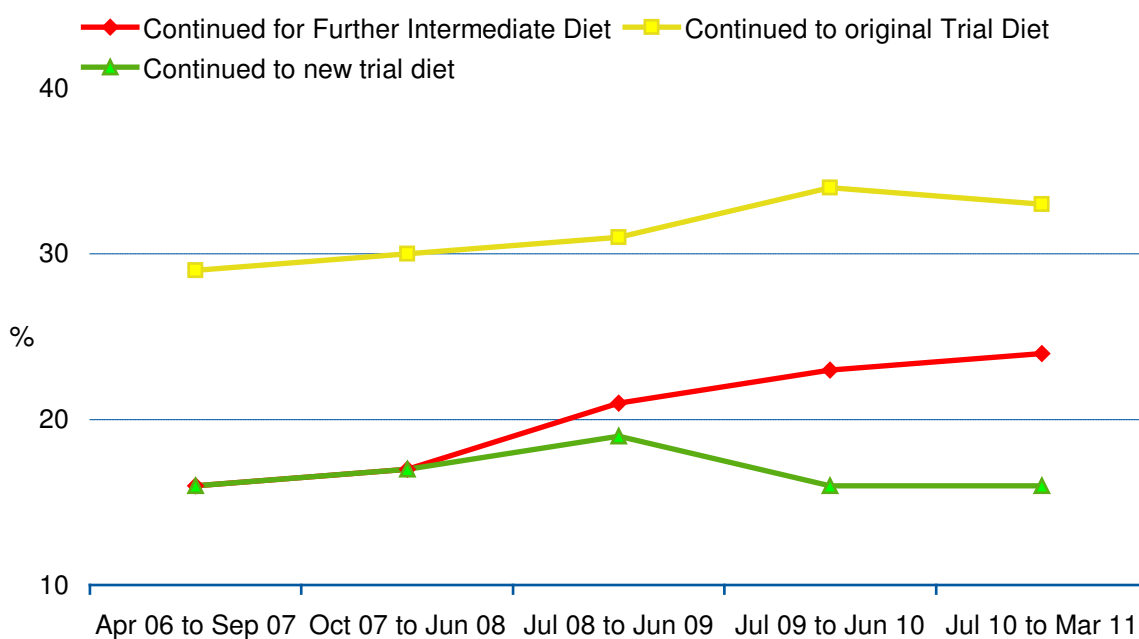
- 3.34 A key objective of the reforms to disclosure *post*-PD is to permit more 'effective' IDs. Effective IDs may be considered to be those which are 'terminal' – allowing the TD to be cancelled – or which do not affect the existing date for the TD. Thus, an increase in 'terminal' outcomes at ID, and a decrease in continuations may suggest greater impact of the reforms on practice and procedure.
- 3.35 Table 3.3 showed that, nationally, there has been a decrease in the proportion of IDs which are conclusive. This is expected given the increase in cases concluding earlier as noted above. Pre-reform 27% of all Sheriff court IDs were conclusive, this dropped to 21% between July 2008 and June 2009.
- 3.36 As might be expected, a large part of the decrease in the proportion of IDs which are conclusive is explained by a reduction in the proportion where a guilty plea is offered, as shown in Figure 3-D – such cases now being more likely to be disposed of at PD. Overall, the rate of IDs with a guilty plea has decreased from 19% in the pre-reform period, to 13% in the most recent post-reform period. This trend is seen in each of the case study courts, however for some the difference is more dramatic. In Court B, for example, there has been a decrease of 13 percentage points from 21% pre-reform to just 8% in the most recent post-reform period. A similarly large decrease of 9 percentage points has been recorded in Court D. Despite these decreases, neither Court B nor Court D in particular have seen corresponding large increases in the proportion of conclusive PDs suggesting that these IDs are being continued to further IDs or to a trial diet. It is notable that Court D also recorded the smallest change in early guilty pleas. It is worth re-stating that these data describe the outcomes of *diets*, not cases viewed from start to finish. As such, it is possible that the proportion of IDs which result in a guilty plea may change without any corresponding change in the proportion of PDs with a guilty plea because both sets of data refer to different groups of cases.

Figure 3-D % of Sheriff Court IDs with a guilty plea over time, by court



3.37 The offer and acceptance of a guilty plea is only one of a number of possible outcomes at ID which are of interest to this research. Changes to the post-pleading diet disclosure process introduced around the same time as the reforms were designed to reduce delay in the later stage of summary cases and decrease 'churn'. A measure of success flowing from better preparation afforded by disclosure reforms would be a decrease in the proportion of IDs continued to another ID date or a revised TD date and conversely an increase in the proportion of first called IDs proceeding without further delay to the original TD. Analysis of these data, at a national level – for all Sheriff Courts – are included in Figure 3-E.

Figure 3-E % of all Sheriff Court IDs which were continued over time



3.38 There are a number of points to note about the graph. First, there has been a slight increase in the proportion of IDs which are continued to the original TD suggesting that a higher proportion of cases are better prepared at ID and are therefore able to proceed to trial as originally planned. Second, there is also an increase in the proportion of IDs continued to a further ID with an unchanged TD. Finally, the proportion of IDs continued to a new ID and TD has not changed. The last two points suggest that since the changes to post-PD disclosure were introduced, whilst there is an increase in the likelihood of an ID being continued, this continuation is not any more likely to affect the original trial date than previously. This is likely to minimise the overall duration of the case from end to end. It may be that issues which are raised at ID are now more likely to be addressed more quickly than previously thus allowing them to be dealt with by a quick further ID rather than having to allow considerable time and thus affecting the trial date.

3.39 Interviewees in the case study research suggested a number of issues which may be contributing to these trends:

- The point at which full disclosure actually takes place was mentioned. If disclosure were made using the pen drive system¹², and the drive was only handed over at the ID, the solicitor would have no opportunity to look at contents in court or take advantage of the client being there to take instructions.

¹² At the time of the research, where possible, and in the majority of cases, full disclosure by COPFS was made by copying electronic copies of the relevant documentation to a pen drive – a small, portable disk drive which can be inserted into the USB port of a computer – and the pen drive was given to the defence rather than the paper documentation itself. Since then COPFS have established a secure disclosure website to which defence solicitors can sign up. In this system, the disclosable material is placed on the secure site by COPFS and defence solicitors log on to download it.

- The variation in the accessibility and quality of communication between Fiscals and defence solicitors also had a potential impact. If the defence has had an opportunity to consult the Fiscal beforehand – for example, via a pre-ID surgery, which operates in some courts but not in others – any potential issues likely to occur at the diet may have already been discussed.
- The extent of accurate information available to Fiscals as to the identity of the defence solicitor acting in the case. One area was experimenting with letters of representation that were to be filled out at ID and pinned to the PF's file.

3.40 It is also likely that local diet scheduling will affect these data. In some areas the ID is scheduled two weeks before the trial whereas in others it is scheduled four weeks before. The former arrangement maximises the time between PD and ID, but reduces the ID to TD period. Thus it may be less likely that cases are continued to a further ID or new ID because there has been more initial preparation time in the first place. However, when a continuation is required, it affects the trial date because the ID is so close to the original TD there is insufficient time to schedule a further ID and a new and later TD has to be scheduled. In the latter arrangement, cases may be less likely to be organised at ID because the period between PD and ID is shorter, but when a continuation is necessary it is possible to schedule a further ID before the trial. Thus an ID two weeks before the trial will equal higher 'continued to new TD' rates and an ID four weeks before will equal higher 'continued to further ID' rates. Whilst programming TDs further away from IDs may result in fewer TDs having to be re-scheduled, it will potentially increase the overall average duration of cases. Court programmes are managed individually by the Sheriff Clerk in each court and there are unique differences in the way each Sheriff Clerk will manage the business at each court. As such, there are many differences between courts and the way business is programmed making this potential explanation difficult to investigate further.

3.41 Changes to ID outcomes will also likely have been affected by the shift in the volume and nature of court business discussed above. With a larger proportion of its workload now made up of more serious crimes and offences which may be more likely to cause complications – because they may be harder to prove, are likely to have more witnesses and thus a greater amount of material for disclosure and more difficulties with court scheduling – it is perhaps to be expected that Sheriff court cases will have, on average, a higher likelihood of continuation and delay. The less serious and thus potentially quicker and less problematic cases are now largely being dealt with in the JP courts.

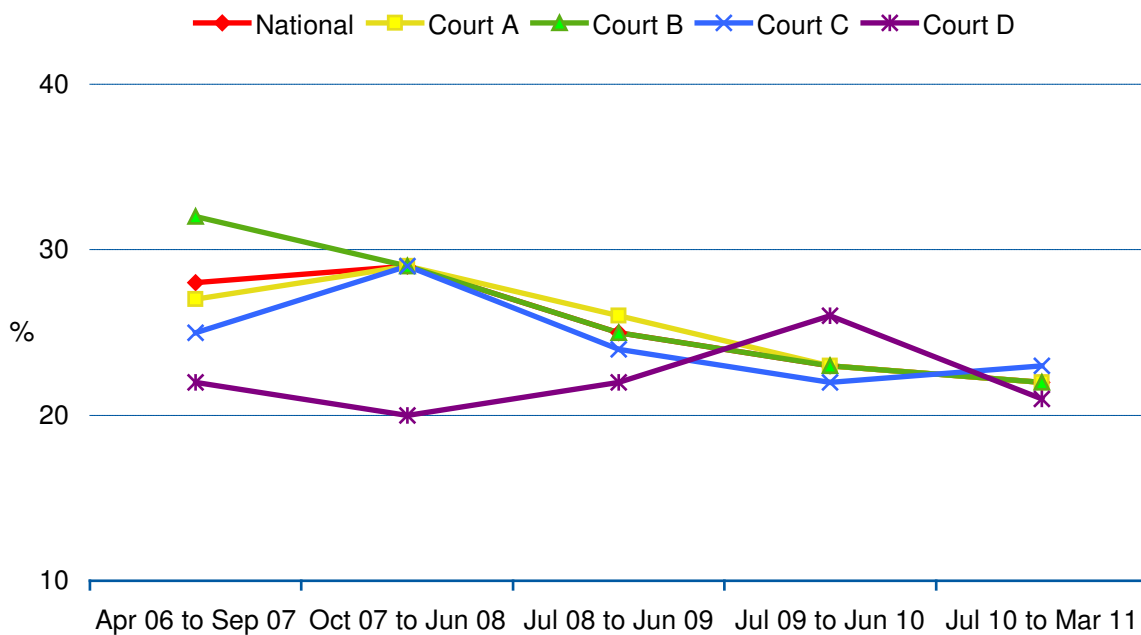
Trial diets

3.42 The data in Table 3.3 suggests that although many PDs and IDs are not conclusive and thus cases do go onto a TD, more early diets are now conclusive than had been the case pre-reform.

3.43 Overall, TDs were less likely to be conclusive in the most recent period than they were pre-reform. Pre-reform, 62% of all Sheriff court TDs were conclusive compared with an average of 57% between July 2010 and March 2011. The national data suggest little change to the proportion of conclusive TDs following the disclosure reforms but there is a more notable drop in the period following the legal aid changes. This lower rate has been sustained since then.

3.44 Figure 3-F illustrates an overall reduction in the proportion of TDs which result in a guilty plea. Nationally, the figure drops from 28% pre-reform to 22% in the most recent quarter. This broad trend is largely mirrored in the individual courts with little variation between courts in the average figures for each time period. The only exception is in Court D which, although recording a very slight drop in the most recent data (down to 21% from a pre-reform rate of 22%), the rate followed a significantly different trend to the other courts, dropping initially then rising before dropping again. There is little in the qualitative data to explain this but we suggest it may be a system adjustment to the reform or some short-lived local circumstances.

Figure 3-F % of Sheriff Court cases with guilty plea at TD over time, by court



3.45 A key objective of the reforms was to reduce delay and churn by ensuring that cases were not unnecessarily drawn out – for example, going all the way to a TD but resulting in no trial. The data suggests that there has indeed been some reduction in unnecessary churn and that cases are being resolved at earlier stages in the process.

3.46 A range of data, shown in Table 3.5, allows exploration of change in other outcomes at TD. The overall proportion of TDs which result in a guilty plea, as shown in Figure 3-F, is obtained by summing the first two rows of the table. As the data show, the breakdown of guilty pleas indicates that the reduction

has occurred through a decrease in the proportion of cases at TD where the guilty plea results in the TD being adjourned to a sentencing diet – from 17% pre-reform to 11% in the most recent period.

3.47 Otherwise there has been little change to TD outcomes. In particular however, in terms of reducing delay, it is notable that a similar proportion of TDs pre- and post-reform result in either adjournment to a further TD because a witness has not appeared or the issue of an apprehension warrant being granted because the accused has not appeared. Indeed, TDs are slightly more likely to be adjourned now than they were pre-reform. However, this may again be explained, at least in part, by the larger proportion of Sheriff court business which consists of complex cases involving multiple accused and witness and multiple charges when compared to the pre-reform period.

Table 3.5 Average % of all Sheriff Court trial diets with specific outcomes over time

Trial diet outcome	Average % of cases with outcome in period				
	Apr 06 to Sep 07	Oct 07 to Jun 08	Jul 08 to Jun 09	Jul 09 to Jun 10	Jul 10 to Mar 11
Guilty plea, no evidence led, disposed at trial diet	11	11	11	11	10
Guilty plea, no evidence led, adjourned to sentence	17	18	13	12	11
No evidence led, adjourned to further trial diet	24	21	25	26	26
Adjourned Crown motion, witness not cited/absent	8	10	12	13	11
Warrant to apprehend issued	6	5	5	4	5
Not Guilty plea accepted	4	4	3	3	3
Not Called/ Deserted	14	14	13	12	15
Evidence led, adjourned to further trial diet	2	2	3	3	3
Evidence led, adjourned to sentence	3	3	3	3	3
Other	11	12	11	13	13

Overall changes in guilty plea rate

3.48 The analysis above has provided a detailed insight into the change in diet outcomes, in particular guilty plea rates, at each diet. The changes to SCLA and disclosure introduced by SJR were aimed at encouraging guilty pleas earlier in the process rather than increasing guilty pleas per se. However, it is difficult, from consideration of each individual stage, to obtain a sense of whether guilty pleas are on the whole more likely following the reforms or whether they simply now occur earlier. Because of the way the data on the rates at each individual stage are compiled, the rates cannot simply be added

together to obtain the overall rate. However, it is possible to use these data to estimate the overall guilty plea rate both pre- and post-reform.¹³

- 3.49 Our estimates suggest that in the pre-reform period considered, 61% of all cases had a guilty plea offered at some stage in the proceedings. In the post-reform period this figure was almost identical at 62%. Whilst it must be borne in mind that these figures are based on estimates, these findings provide a tentative indication that the reforms have indeed encouraged earlier guilty pleas while not affecting the overall proportion of such pleas.

Case duration

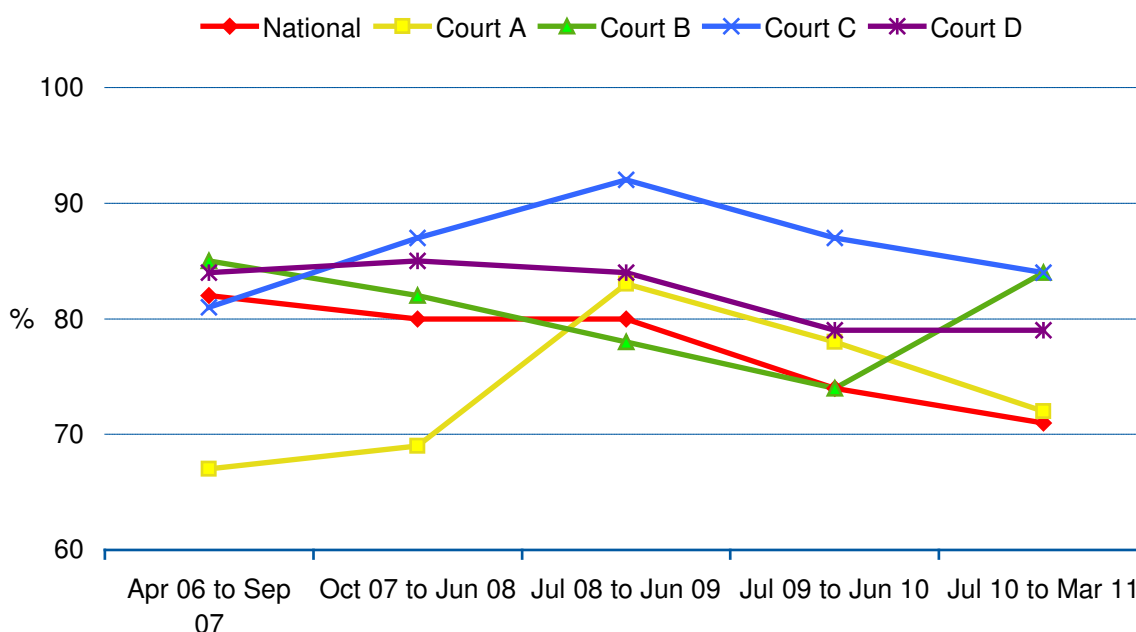
- 3.50 There are a range of additional measures with which the speed of case resolution can be assessed. These measures allow consideration of performance against timescale targets and the average time for various stages of the process.

Percent of cases disposed of within 20 weeks

- 3.51 The data in Figure 3-G show, nationally for all Sheriff courts and for each of the case study courts, the average proportion of summary cases which were disposed of within 20 weeks in each period. Overall, Sheriff summary cases are less likely to be disposed of within 20 weeks now than they were prior to the reforms to disclosure and SCLA. An average of 82% of cases were disposed of within 20 weeks in the pre-reform period compared with 71% in the most recent post-reform period. It would be simplistic to attribute this to a 'failure' of the reforms to SCLA and disclosure as such since, as we have repeatedly indicated, these changes were just part of a complex programme of interacting measures introduced at broadly the same time, including a significant change to the nature of Sheriff court business. Furthermore, the analysis in the previous section has suggested that cases are being resolved earlier in the court process following the reforms, despite that process overall now taking longer than 20 weeks for a greater proportion of cases.

¹³ A full description of the assumptions behind these estimates and further detail of the figures used to calculate them are included in Appendix A.

Figure 3-G % of Sheriff Court cases disposed of within 20 weeks, by court and over time



3.52 Trends for each of the individual courts vary. Only Court D follows the pattern of the national data with a gradual decline over the period considered. Both Court A and Court C saw an initial rise after the changes to disclosure and summary criminal legal assistance followed by a decline. Despite this decline, the most recent rate for each is slightly higher than the pre-reform rate. In Court B, the rate saw a steady decline dropping from 85% pre-reform to 74% between July 2009 and June 2010 before it rose back to 84% in the most recent period.

Performance against key disclosure-related timescales

3.53 The period between PD and ID is when full disclosure occurs – where the Fiscal will request full witness statements from the police to disclose to the defence. Although the reforms to disclosure did not specifically change anything about this stage of the process, the System Model underpinning the reform of summary justice contained targets regarding appropriate timescales for Fiscals to notify the police of the need for statements (within 3 days of the PD) and the provision of the statements by the police to Fiscals (within 28 days of the accused pleading not guilty). Performance against these timescales has been monitored; a summary of the extent to which the timescale is being met nationally, and by the case study courts, is shown below.

Table 3.6 Proportion of cases in which PF notifies the police of need for full statements within 3 days of PD, by court

	Jul 08 to Jun 09	Jul 09 to Jun 10	Jul 10 to Mar 11
Annual totals			
National	66%	74%	85%
Sheriff Court			
Court A	64%	73%	82%
Court B	80%	84%	79%
Court C	69%	93%	90%
Court D	96%	99%	100%

- 3.54 Nationally, the likelihood of this timescale being met is considerably higher now than it was in the early post-reform period. Between July 2008 and June 2009, the timescale was met in 66% of cases – by March 2011 this had risen to 85% of cases. The increase was particularly significant in Court A and Court C, who each saw the rate rise by around 20 percentage points. Court D had a very high rate of cases meeting the timescale initially and this has been improved slightly. In Court B, on the other hand, which also had a high rate of cases meeting the timescale initially there has been no notable change to this figure. These variations will most likely result from variations in the related practices of different Area PF offices and different staffing levels.
- 3.55 Between July 2010 and March 2011, in 87% of relevant summary cases the police provided full statements within 28 days (see Table 3.7). This is an improvement of 10 percentage points from the figure for July 2008 to June 2009. Increases were also generally recorded for each of the case study courts. Court B, in particular, saw a significant improvement from 71% to 87%, although it had the lowest rate of any of the case study courts in the most recent period. Thus both timescales are met in a higher proportion of cases now than in previous years.

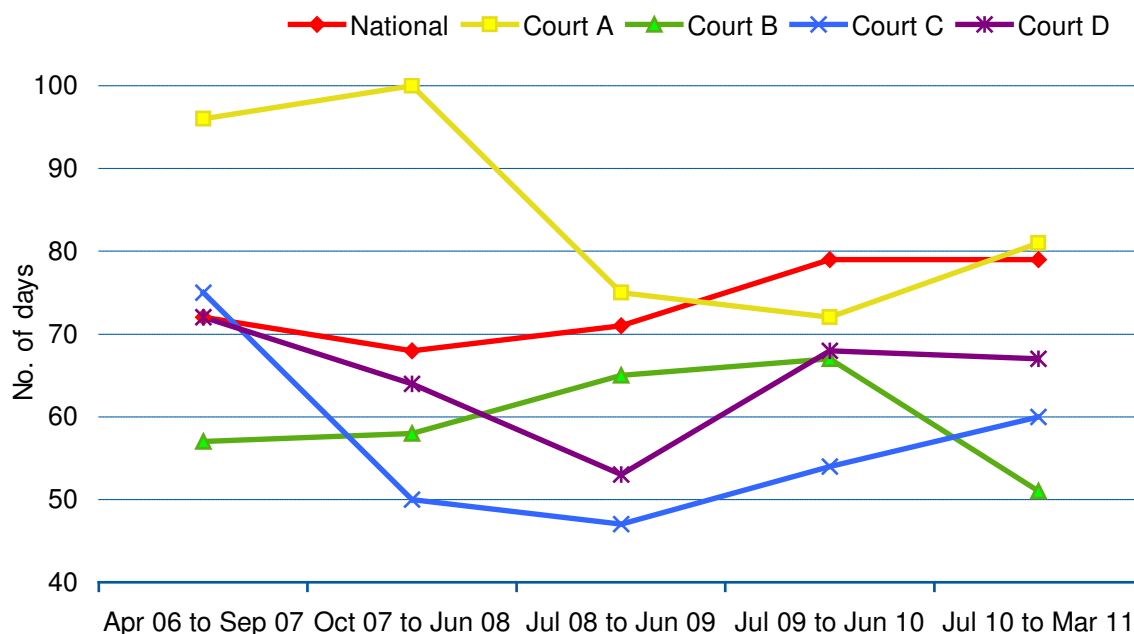
Table 3.7 Proportion of cases in which police provide full statements within 28 days of PD, by court

	Jul 08 to Jun 09	Jul 09 to Jun 10	Jul 10 to Mar 11
National	77%	80%	87%
Sheriff Court			
Court A	77%	86%	92%
Court B	71%	81%	87%
Court C	86%	90%	92%
Court D	90%	92%	94%

- 3.56 Data on the average duration of the next stage of the process – from ID to verdict – are shown in Figure 3-H. As the graph shows, the average time between ID and verdict has increased in Sheriff summary cases. Nationally, the average figure for the pre-reform period was 72 days; this had slightly

increased to 79 days by June 2010 and has remained at that figure for the most recent period. This corresponds with the slightly increased likelihood of IDs and TDs being adjourned as shown in Figure 3-E and Table 3.5 above.

Figure 3-H Average number of days between Intermediate Diet and Verdict in Sheriff summary cases, by court



3.57 Contrary to the national trend, each of the individual case study courts has actually recorded a shortening of this stage, particularly Court A and Court C where the average length has reduced by around 15 days between the earliest and latest periods shown. However, the decrease does appear to have 'bottomed out' with both courts showing slight increases in the duration of this stage since June 2009.

Average number of diets per case

3.58 The final measure of case timing is a count of the average number of diets per case. The data are shown by court and time period in the table below. There has been little notable change to the average number of diets per case following the reforms.

Table 3.8 Average number of diets per case, by court

	Apr 06 to Sep 07	Oct 07 to Jun 08	Jul 08 to Jun 09	Jul 09 to Jun 10	Jul 10 to Mar 11
Sheriff Court					
National	3.3	3.2	3.0	3.0	3.1
Court A	3.7	4.0	3.4	3.4	3.6
Court B	3.3	3.3	3.3	3.5	3.4
Court C	3.3	3.0	2.7	2.8	2.9
Court D	3.2	3.2	2.8	3.1	3.2

- 3.59 Thus as with the data on the proportion of cases disposed of within 20 weeks, this data suggests little or no improvement to the time taken to dispose of Sheriff summary cases despite an increase in early guilty pleas. In fact, more detailed data extracted on a sample of 213 Sheriff summary cases¹⁴ indicates that, whilst a guilty plea may be accepted at pleading stage, these cases may still be called to court several times before the case is fully concluded. On average, those cases which concluded at PD had been called in court 2.8 times. Around 40% were disposed of after a single calling, and a further 22% in two callings. The remaining 38% of cases required 3 or more callings before concluding.
- 3.60 Again, it is perhaps unsurprising that there has been little or no improvement to the duration of Sheriff court cases given the significant shift in the nature of Sheriff court business. However, these data also reflect an increase in the rate of pleading diets which are continued without plea. Analysis of monitoring data indicates that in the immediate pre-reform period, just 10% of PDs were continued without plea. In contrast, in the most recent pre-reform period, 22% of PDs had the same outcome. This change is not unexpected as under the objectives of SJR, further pleading diets leading to resolution at pleading stage is perhaps preferable to an initial not guilty plea and subsequent guilty plea at ID or TD, after the necessary – but often resource intensive - steps have been taken to fulfil the full disclosure requirements which follow.

The estimated economic impact of the reforms

- 3.61 We have assessed the wider economic impact of the reforms using decision modelling¹⁵. This analysis calculated the average costs of a case being processed through the Sheriff court from PD through to case disposal both pre-reform and post-reform. The analysis incorporated the court and prosecution costs associated with PDs, IDs, TDs and sentencing diets. The costs of different disposals (e.g. community and custodial sentences) and expenditure on criminal legal assistance have also been included. However, costs related to the issue and execution of warrants for non-appearance – and any related custody – and with the attendance of police witnesses at trial diets were not included.
- 3.62 A summary of the estimated pre- and post-reform cost and the estimated savings incurred by these elements of the system since the introduction of the summary criminal legal assistance and disclosure reforms are summarised below.

¹⁴ These cases were selected for consideration of their disclosable summary. Further discussion of this element of the research is provided in Chapter 4.

¹⁵ A full description of the economic analysis undertaken including the model developed, and the costs and probabilities used, is included in Appendix B.

Table 3.9 Court, prosecution and legal aid costs for Sheriff court cases pre and post-reform

	Pre-reform	Post-reform	Difference post-reform to pre-reform
	2007/08	2009/10	
Average cost per person: pleading diet to sentencing	£3047	£2642	-£405
Estimated system cost excluding cost of disposal	£1364	£1366	+£2
Estimated system cost excluding cost of disposal and defence agents	£751	£753	+£2
Total no. of cases registered in the Sheriff court	97456	83276	-14,180
Estimated system cost: pleading diet to sentencing	£297m	£220m	-£77m
Criminal legal assistance expenditure	£96.3m	£68.8m	-£27.5m

3.63 The model run using pre-reform data results in an estimated cost per person going through the system of £3,047. Using data for the post-reform period the expected cost per person is £2,642. This suggests savings (for the events modelled) of £405 (13%) on the pre-reform situation. If this average saving is applied to the 83,276 Sheriff summary cases processed in 2009/10, this suggests a total saving of £33 million when compared with the cost of processing that number of cases through the pre-reform system.

3.64 The vast majority of the per case saving is generated via a change to sentencing practice between the pre- and post-reform periods. A case which results in a custodial sentence will, on average, cost more to administer than a case which results in a financial penalty. Post-reform, there are proportionally fewer custodial disposals (dropping from around 16% of disposals pre-reform to 12% of disposals post-reform) and proportionally more financial penalties (increasing from around 47% of disposals pre-reform to 56% of disposals post-reform). Fewer expensive disposals and more cheaper disposals brings the overall cost per case down. If the costs associated with these *disposals* are excluded, the estimated cost per person going through the Sheriff system is almost identical pre- and post-reform at £1364 and £1366 respectively. The savings generated via the increased rate of early guilty pleas are offset by the corresponding increase in adjournments at all diet stages post-reform with therefore little overall change in the number of diets as noted above.

3.65 In 2007/8 the total expenditure on summary criminal legal assistance – that is on A&A, ABWOR and SCLA - for cases going through the Sheriff Courts was £58.2 million¹⁶. In 2009/10 the equivalent figure was £47.2 million, a decrease

¹⁶ This is calculated as the total amount paid in criminal legal aid related to Sheriff court cases plus 86.5% of the total amount paid in relation to ABWOR and A&A (the remaining 13.5% for these fee types being paid in relation to District/JP court cases).

of £11 million. As noted earlier, there is little evidence to suggest that typical per case costs for summary legal assistance have reduced since the reforms. As such, these savings appear to have arisen largely from the reduced volume of cases now reaching court. However, some of the savings will also have occurred from the increase in the proportion of cases receiving ABWOR payments and the corresponding decrease in duty solicitor, advice and assistance, and summary criminal legal aid payments. This shift, at least in part, is attributable to the increase in earlier case disposal following the reforms.

4 PERCEIVED IMPACT OF THE REFORMS ON CASE PREPARATION AND PLEA ADVICE

Introduction

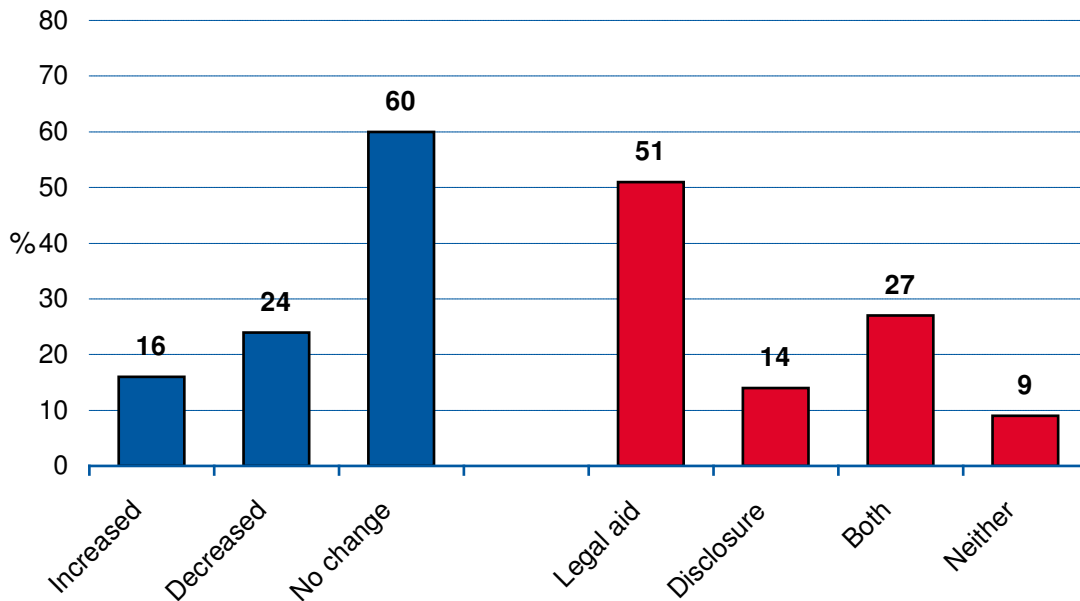
- 4.1 This chapter examines perceptions of the impact of the reforms on case preparation and plea advice. As such it focuses, in particular, on the practices and experiences of defence solicitors in relation to the level and nature of client contact and the advice given to their clients about how to plead. Although the reforms to both legal aid and disclosure are addressed in this context, the main discussion revolves around the legal aid reforms as these were particularly concerned to influence the behaviour and practice of defence solicitors. Perceptions of the wider impact of the reforms to disclosure are discussed in the next chapter.
- 4.2 The chapter is based on data from a number of sources: a national survey of defence solicitors (with an achieved sample of 202 and a response rate of 29% - see Appendix C for further details); qualitative telephone interviews with defence solicitors; and qualitative face to face interviews with defence solicitors, fiscals, and accused persons.
- 4.3 The analysis presented here will show that criminal justice professionals found it difficult to separate out the impact of the reforms to SCLA and to disclosure. On balance, however, changes to legal aid were seen to have been of greater significance than the changes to disclosure. In addition, defence solicitors often made reference to the impact of the move to fixed payments under SCLA. This structural element of legal aid was introduced in 1999, and was not changed by SJR. Nevertheless, it continues to feature prominently in discussions with solicitors.

Impact of legal aid and disclosure reform on early case preparation

- 4.4 There does not seem to be strong evidence that the level of client contact has reduced significantly in recent years. But those who did think there had been a change were much more likely to attribute this to the legal aid reforms than to the changes to disclosure or other factors.
- 4.5 The postal survey of defence solicitors included questions on whether there has been any change in client contact (both the level of contact and the nature of that contact) since the summary justice reforms to criminal legal assistance and disclosure were introduced. Most respondents (60%) said there had been no change in contact levels, 24% that there had been a decrease and 16% that there had been an increase.
- 4.6 Those who said there had been either an increase or a decrease were asked to say whether this was as a result of the reforms to legal aid, disclosure, both of these, or neither. The most commonly mentioned reason for a change in level of client contact appears to be the reforms to legal aid - mentioned by 51% of solicitors who said there had been a change (see Figure 4-A). By comparison, 14% perceived the change to be mostly a result of the disclosure reforms, whilst a further 27% perceived that both reforms have worked together to cause this

change. Nine percent perceived that change in contact was not related to either the legal aid or disclosure reforms¹⁷. Whilst it would have been useful to analyse these responses separately by whether there had been a perceived increase or decrease in contact levels, the small sample sizes for these groups meant this was not possible. However, the survey data suggests that where there is a perception of a change in contact levels, this appears to be related more to legal aid than disclosure.

Figure 4-A Change in overall level of client contact, and reasons why



- 4.7 The open text responses from the solicitors survey, the follow up telephone interviews and the earlier case study interviews with defence solicitors help to illuminate the views of the one in four (24%) defence solicitors surveyed who indicated that there had been a decrease in their contact with clients.
- 4.8 Financial constraints were a common theme in explanations of this apparent decrease in client contact, with defence solicitors talking about ‘inadequate funding’, ‘poorer remuneration’, ‘not getting paid for client contact’, ‘legal aid cuts’, and a ‘reduction in the fixed fee’. But as we shall see below, there is little quantitative evidence to support such a view.
- 4.9 There has been considerable change over the last 15 years in the way that SCLA is paid, and it is likely that some of the perceptions picked up in this study have been influenced by specific changes which were introduced either before or after those introduced via SJR. One of the most notable of these earlier changes was the introduction of a fixed payment system in 1999 for summary cases. Previous research into the impact of fixed payments in summary cases (Stephen and Tata, 2006) suggested that there had been a decline in the level of client contact as a direct result of the move from itemised billing (‘time and line’) to fixed payments.

¹⁷ Note that due to rounding, totals may not be equal to 100%

4.10 Some solicitors clearly feel they are now worse off as a result of a number of factors including the fixed fee system itself, which was seen as placing restrictions on the amount of work they could do on a case as well as the time spent with a client. There were also concerns about the removal of the minimum payment for Advice and Assistance; the frontloading of payments; the impact on defence solicitor business from a shift in summary cases to the JP court; and the pressure to take account of business needs such as reducing costs and increasing the number of cases they have. Overall, these developments were felt by some defence solicitors to have impacted negatively on client contact and to have resulted in fewer meetings with clients (including less contact outside of court, fewer custody visits at police stations, fewer visits to clients in prison). This, in turn, was felt to impact on the quality of case preparation and representation.

My initial reaction obviously was that we were not going to be paid for work . . . whether you have 1 or 10 meetings with the client and if necessary to precog witnesses. If you go to an ID court and you are not first on list you could be waiting 2-3 hours not being paid when you could be doing a lot of work that fixed fee doesn't cover . . . [DSF 44]

You have to explain to clients that there are things that you cannot do now, and you have to say to them quite bluntly that "Yes – you may want me to go and see a witness who lives in Skye, but I'm not prepared to do that. I can't do that". [DSF 22]

4.11 But the perception that remuneration is now significantly lower does not appear to match the analysis of aggregate-level change in the value and mix of payments made under SCLA shown in Table 3.2. The number of ABWOR payments has increased – with a corresponding decrease in the number of payments under summary criminal legal aid – but this has been accompanied by a significant increase in the ABWOR block or 'case disposal' fee. There is little to suggest, from that data, that per case remuneration is significantly different from the position pre-reform.

4.12 What is clear, though, is that fewer summary cases now reach court (as seen in Chapter 3). This suggests there is less potential business for defence solicitors which may be impacting on their overall income. This is not, of course, a result of the reforms to SCLA, but as it has occurred alongside those reforms, it may have associations which are colouring solicitor perceptions. Regardless of changes in the actual level of remuneration – and of the reasons for those changes - it is clear that many defence solicitors believe that they have been adversely affected and that this in turn is affecting the quality of their client relationships and case preparation.

4.13 But not all defence solicitors held this view, and some viewed the current level of remuneration as adequate in dealing with their clients and preparing their cases (see discussion of remuneration for summary work later in this chapter).

4.14 And, where contact was felt to have decreased, this was not always viewed negatively. Some defence solicitors indicated, for example, they did not have to spend as much time discussing things with clients as a result of having a

disclosable summary which helped to focus their discussions and required fewer meetings:

Disclosure triggers you into writing to clients or getting them in and you can go through everything with him. [DST 1507]

Not so much because of the disclosure. Obviously you can't simply send the disclosure out to the client so you need to get the client in to discuss the disclosure: so there's still the same contact there. But because the disclosure comes usually in one fell swoop you don't have to see the client so many times as you were doing before when you were doing separate precognitions. (DST 1059)

4.15 A minority of defence solicitors surveyed (16%) suggested that client contact had actually increased since the reforms were introduced. Evidence from the qualitative work with defence solicitors suggests that this was linked to having more evidence to discuss and review with the client at an early stage as a result of the changes to disclosure (both the disclosable summaries and the full statements). Another factor here was the level of financial information now required for legal aid applications – indeed, time spent on this was sometimes, it was claimed, at the cost of discussing the case itself. There was also a view that some solicitors, driven by business considerations, may wish to maintain fairly high levels of client contact as a way of retaining clients on their books. Related to this it was suggested that solicitors now tried to ensure that clients appearing from custody were not ‘put through’ by the duty solicitor. For instance:

I'm not sure there is less client contact.[...] particularly in custody cases – allowing your own solicitor to act, and I think that's led to more client contact [...]. There are now more practitioners [...] making the effort to be at court – particularly for the custody cases – to see their own clients. [Defence solicitor stakeholder respondent 3]

4.16 Of course, the quality of representation is not just about the level, but the nature of the contact that solicitors have with their clients. The survey shows that solicitors were more likely to perceive a change in the way they dealt with clients than in the level of contact per se. Half (50%) those surveyed felt that the reforms had affected the way they themselves deal with clients. However, when the same question was asked in relation to other solicitors, a higher proportion (58%) felt that clients were being dealt with differently. Solicitors answering in relation to their own practice tended to attribute any changes in how they dealt with clients to the legal aid reforms (43%) rather than disclosure (25%), although around a third (30%) felt this to be a result of a combination of both reforms¹⁸. In terms of what other solicitors do, relatively more weight was given to legal aid reform as an explanation for change in the way clients are dealt with (49%), and less for disclosure (11%), whilst a combination of both reforms was mentioned by 39%.

¹⁸ The remaining 2% attributed the change to something other than these reforms.

4.17 Again, the qualitative data (from both defence solicitors and Fiscals) are helpful in illuminating these findings. They highlight, in particular, the way that an emphasis on early resolution, as a result of legal aid changes, has shaped solicitor-client interactions. It was suggested, for example, that some cases were now being discussed with the prosecution before taking fuller instruction from the client. Another factor, discussed more fully in the next chapter, relates to the impact of the disclosable summary.

[Referring to disclosable summaries] It does give a starting point. I think if a client is .. is willing, or is indicating a willingness to tender a plea, it gives you a starting point to work from that you didn't have before.[DSF 22]

4.18 Not surprisingly, there was a wide range of views among accused persons about the quality of case preparation. Some felt their solicitor had adequate time to prepare, while others did not and felt that the quality of their representation had suffered as a result. Some felt that their solicitors were too busy to prepare properly, especially when contact might be limited to a brief discussion in the cells on the morning of the court appearance:

"Cause you're in the cages, and you only get to speak to him for a couple o' minutes, and then he's off again, ken. Depends how many cases he's got going on!" (AF4).

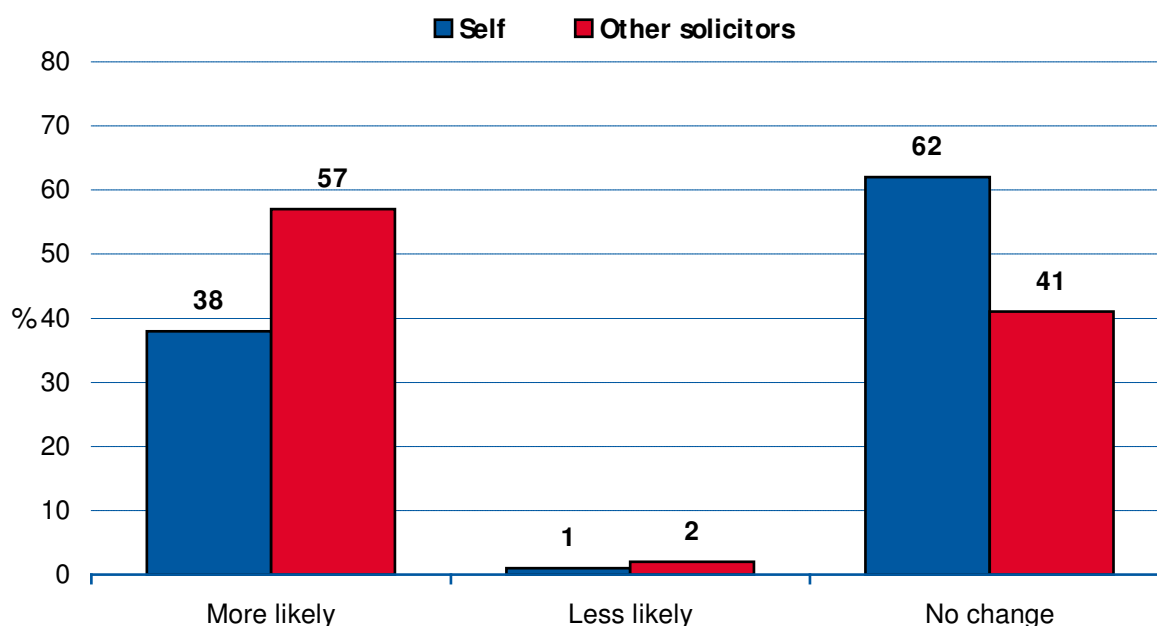
4.19 Others were quite happy with the solicitor that they were officially represented by, despite occasions when that representation had to be delegated: "I really put my trust completely in him" (AF5); "he's always there for us" (AF2).

Impact of legal aid and disclosure on plea decision-making

4.20 We have already seen from the analysis of SJR monitoring data in Chapter 3 that there has been an increase in the rate of early guilty pleas following the reforms. But are the reforms seen as directly contributing to this? Most interviewees felt that the legal aid reforms have had some influence in encouraging early guilty pleas, although solicitors were more likely to see this in the practice of other solicitors than in their own. Again, many felt that it was the combination of legal aid and disclosure reforms that had facilitated early guilty pleas.

4.21 In the survey, solicitors were asked firstly whether they, and then other solicitors in general, were more or less likely to advise their clients to plead guilty early since the reforms were introduced or whether there had been no change in this practice (Figure 4-B). In terms of their own work, most solicitors (62%) stated there had been no change. Fewer thought there had been no change in the practice of other solicitors (41%). Whilst 38% said they themselves were now more likely to advise an early guilty plea, the figure was higher when answering in relation to what other solicitors do (57%). Very few solicitors felt that either they or other solicitors in general were now less likely to advise an early guilty plea (1% and 2% respectively).

Figure 4-B More or less likely to advise a guilty plea



4.22 As the analysis of diet outcomes in Chapter 3 showed, there has been a change in guilty plea rates at pleading diet and particularly in the resolution of cases where the accused is appearing from custody: from 23% to 44% and then to 43% in the third year. Interviews with defence solicitors suggest that some may be now more ready to advise their clients to plead guilty because of the revised financial arrangements for legal aid, but that this is often working in combination with the impact of changes to disclosure. For example:

The disclosure has made it easier that way for me to persuade them that there is something here. Why should we do it? The acceptance letter makes it easier to say, "This is an offer. We can go with this or else it'll get worse", and therefore the ABWOR payment of a full payment is 'Manna from Heaven' because I'm now getting paid for doing work – fairly straightforward work – at a very high rate.[DSF 27]

Front loading has made a huge difference. In custody court the majority used to plead not guilty. There's been a change in the mindset of lawyers: because it's front loaded they're going to get paid much as they would if they pled them not guilty. In the pleading diet you get a lot of pleas there. [DST 1659]

Remuneration for summary work

4.23 We have already seen that financial constraints were widely felt by defence solicitors to be impacting on the quality of client contact and representation. Not surprisingly, then, the research also suggests that most solicitors feel they are insufficiently remunerated for summary criminal work. Solicitors who took part in the postal survey were asked whether they agreed or disagreed that since the reforms, solicitors are given a suitable level of remuneration to undertake summary criminal work of an appropriate quality. Three quarters (75%) disagreed, 16% agreed and 9% neither agreed nor disagreed.

- 4.24 Many solicitors feel that remuneration has fallen in real terms and that they are being asked to undertake more work for less. The change in remuneration levels and payment structure was often linked to issues of fairness. However, as noted earlier, many of the comments from solicitors referred to the 'fixed' nature of SCLA fees – a structural element of legal aid not directly changed by SJR. Investigating complex cases¹⁹ was considered particularly challenging within the fixed fee system, and some were concerned that they have to rely on the disclosable summary and police report as the only available evidence, whereas previously they may have conducted their own precognitions. It was also pointed out (by a Sheriff) that the legal aid payment does not cover the expense of solicitors having to print out all the disclosure documents themselves. One solicitor reported that they now read through statements with clients on the computer as it is too expensive to print off paper documents.
- 4.25 But not all solicitors felt that current levels of remuneration were inadequate. An alternative, if minority, view was that the fixed fee was fair overall, because although solicitors have to spend a considerable amount of time on some cases, this was balanced out by relatively straightforward cases being resolved more quickly.
- 4.26 Some solicitors felt that the 'massive incentive' to submit an early plea was not in the interests of justice, and that clients may not be getting the best service as a result. When asked, in the survey, about the impact of the reforms on fairness to the accused, 39% of solicitors felt there had been no change. A similar proportion (38%), however, felt that the system is now less fair to the accused. The decline perceived by some defence solicitors in client contact, at least among cited cases, was seen as a way in which the system may be less fair to the accused. For example: "From the client perspective it's unsettling to have so little contact" [DS 1647]. Just under a quarter (23%) of defence solicitors suggested that the system is now fairer.
- 4.27 Whilst many accused were unaware of the changes to legal aid since 2008, some were concerned about the nature of the reformed payment structure. Some felt that that clients would not receive the same level of service if they wanted to plead not guilty. Others suggested that solicitors might also encourage clients to plead guilty because of the flat rate payment that they receive irrespective of the amount of work involved in representing a client:

My own personal opinion now is that lawyers get paid a lot of money you know and... I know they work loads of cases and that, you know, there's a lot of people go through the courts and that, but I do think there is a lot being pushed to plead early and get things through the courts quicker (AF11).

¹⁹ Cases which are given 'exceptional case status' by SLAB are not subject to the fixed fee arrangements – see SLAB guidance on criminal fixed payments: http://www.slab.org.uk/profession/summarycriminal/2008%20mailings/summary_fixed_payments_accounts_guidance.pdf

5 PERCEPTIONS OF THE REFORMS TO DISCLOSURE

Introduction

- 5.1 The previous chapter focused on the specific issue of the impact of the reforms on case preparation and plea advice. Although its main focus was on the changes to legal aid, it also showed how these are widely felt to have combined with the reforms to disclosure to produce particular outcomes, especially in relation to early guilty pleas. In this chapter, we examine wider perceptions of the reforms to disclosure – in particular, views of the operation, quality and timeliness of disclosure both pre-Pleading Diet, and between Pleading Diet and Intermediate Diet following the introduction of the reforms. In particular, the evaluation is concerned with how disclosure has impacted on the effectiveness of PDs and IDs and, relatedly, changes in case timings and outcomes.
- 5.2 There are two elements to this part of the research: the first is concerned with the operation of disclosure in the period before PD – in other words, with the use and quality of disclosable summaries; the second is concerned with disclosure practice between PD and ID, sometimes known as ‘full disclosure’.
- 5.3 This chapter again draws on the survey of defence solicitors, and qualitative interviews with defence solicitors, Fiscals, Sheriffs and police officers. It also provides data from an exercise carried out by the research team to assess the quality of disclosable summaries (see Appendix C for a full description).
- 5.4 The chapter will show that practitioners across all agencies appear to have found disclosable summaries helpful in terms of case preparation and supporting earlier pleas. There is also a widespread view that the changes to disclosure have contributed to earlier and more productive discussion between defence solicitors and the Crown. Our own analysis – and the views of most practitioners – also suggest that the quality of disclosable summaries is generally good.
- 5.5 We will argue that although full disclosure is generally seen to be working well, it continues to be associated with continuation and delay in a minority of cases – though it is by no means the only factor here.

Disclosure before the pleading diet

- 5.6 Many of those interviewed felt that disclosable summaries were useful to solicitors in advising their clients how to plead. Indeed, over 70% of defence solicitors responding to the postal survey thought that the information provided by the disclosable summaries was either ‘very helpful’ or ‘quite helpful’ in this respect. Both defence agents and Fiscals felt that the provision of this information meant that the defence was now able to represent clients more effectively. While some felt it was unhelpful that disclosable summaries could not be generated from non-police reports (e.g. DSS), the research team understands that this problem has now been resolved.

5.7 It is clear that the police have put a considerable amount of work into improving the quality of the police reports on which the disclosable summaries are based. One view – expressed by a range of interviewees, including police officers – was that, prior to reform, police reports were perhaps less systematic and sometimes focussed on the evidence which would support the case. However, it was widely felt by police interviewees that ‘now 100% of the information is passed to the PF’ (SPF 13). Police said that the ACPOS guidance detailing what should go into the police report was helpful and that reports were routinely reviewed by a specialist or senior officer before going to the Fiscal, although sometimes in a custody case the time constraints were a problem.

5.8 The quality of disclosable summaries was generally felt to be good - a view supported by our own analysis (see below) – and improving. But some defence solicitors suggested that summaries were of lower quality in complex cases, especially those involving multiple witnesses (such as street brawls). It was also felt that police accounts of civilian statements were often unreliable but that the front-loaded legal aid structure compromised the practical ability to test that evidence.

Police summaries are actually quite good. (PFF 42).

To my point of view, they are a very good plus because we have a lot of clients who say, “Can't remember a thing. I was drunk”. (DSF 27)

If it's a very straightforward simple thing – yes, it's fine. Anything that's other than just some guy shouting and swearing and drink in the street, it's .. they're not particularly great because they're cobbled together from a number of statements, and...it looks as if it's been cut and pasted just on to .. you know, taken from something else and stuck on it. That's what it looks like. (DSF 22)

5.9 It was suggested that other differences in quality were simply explained by the approach of the individual reporting police officer.

The quality of Police reports varies ...in terms of the officer that's put it together. Sometimes we'll say... “couldn't make head nor tail of it”, and sometimes you might get a very good clear one. (PFF 10)

5.10 There was a general view that early disclosure could not but assist the early resolution of cases, particularly in the light of sentence discounting – the influence of which on plea decisions will be discussed in chapter 6. Some, but not all, those interviewed thought that there was already some evidence of this. One defence solicitor, for instance, commented that in order to receive the maximum sentence discount, an early plea was likely “if you see in the summary of evidence that the police caught them red-handed” (DSF 26). This was considered particularly likely in situations in which a client has no memory of the incident as a result of drunkenness or other intoxication. The influence of the Crown’s position on bail on the accused’s decision at the PD is also influential (as will be discussed in chapter 6) but the summary of evidence was felt to contribute further in these situations.

- 5.11 Some Fiscals questioned whether the one-sided nature of disclosure, where the defence are not required to reveal their position to the Crown, was fair. Accused interviewees, on the other hand, saw disclosure, whether in full or in summary form, as essential not only in ensuring a just and fair process but also in helping clients and their solicitors decide on the best way to plead:

I don't know, I'd like to know more about why I'm up for it, and obviously I know what I did and stuff but I think [I'd like] to know more about how the courts work (AF10).

If I don't remember, you know, the crime that they tell me about, then I just won't plead to it. And then, if I'm in court, and, you know, as they go on about it, I may well plead guilty to it then... If they've got enough evidence to convict me, then I'll plead to it... You know what? I used to have a great memory. It's ever since I started taking the epileptic fits that my memory's just went down the drain. [Interviewer: So you're reliant on your lawyer?]. Pretty much, yeah (AF3).

- 5.12 As the above quotations illustrate, many accused felt that legal processes and the associated paperwork were beyond them and they often deferred to their lawyer as a result. Many put this lack of awareness or understanding down to their own drug/alcohol problems, illiteracy, or a lack of meaningful or easily understood communication between client and legal or judicial personnel. However, others were more pragmatic about the 'evidence' against them and several suggested that their lawyers encouraged an early guilty plea, based on that evidence.

- 5.13 An analysis of the proportion of guilty pleas at PD by the type of appearance, as illustrated in Table 3.4 in Chapter 3, provides some support for this view by the type of appearance. Immediately following the disclosure and summary criminal legal assistance reforms, there was a significant increase in the proportion of accused pleading guilty at the PD; and the largest increase occurred in respect of accused appearing from custody. One might speculate that the disclosable summary persuades the accused, often with the help of the defence solicitor, that his real choice is: a) plead guilty immediately and secure release from custody; or b) plead not guilty and remain in custody but ultimately be found guilty because the disclosable summary reveals a strong prosecution case. In other words, the information in the disclosable summary may help to dispel any hope on the part of the accused that he may escape conviction if he enters a not guilty plea.

- 5.14 This influence of immediate outcomes on the plea decisions of accused, and their willingness to offer an early plea, contrasts with another widely held view that many accused are determined to put off the outcome until as late in the process as possible.

And accused...some accused people, a lot of accused people their whole...purpose is to put this off until another day. I can't face up to it today, we'll just put it off and we'll fix a trial and it's...three or four months down the line. (PFF 25)

I suspect you or I if you were told that this is the case against you, and at this stage...if you plead at this stage the penalty which is going to be imposed against you generally will be reduced by a third you would go along with it. But that's not the way folk...the criminal fraternity, the general criminal fraternity operate.(SHF 30)

- 5.15 Some Fiscals and defence solicitors took the view that summaries were not always particularly accurate, and solicitors in particular suggested that they can sometimes be 'over-enthusiastic' (DSF 26) about the strength of the case. Another issue commented on by Fiscals and defence solicitors was that full disclosure did not always confirm precisely what was stated in the summary. Again, a recurring view amongst defence solicitors was that summaries tended to favour the police view of the case. The relevance of this to the timing of plea is that sometimes it is better for the defence to plead not guilty and await full disclosure before finally determining the accused's plea.

Discussion and negotiation between defence solicitors and Fiscals

- 5.16 Some interviewees felt there were still difficulties in communication between prosecution and defence and there was a tendency for both parties to blame the other for this. Nevertheless, 42% of defence solicitors responding to the postal survey thought that disclosure had led to more early discussions about cases with Fiscals. A similar proportion (43%) perceived there to have been no change and 14% were of the view that there was less discussion.
- 5.17 In general, however, it was felt that discussions between Fiscal and defence were now more productive because both parties now had access to the same information.
- 5.18 That said, several defence solicitors remarked upon the difficulty of getting hold of a Fiscal, and some were critical of the centralised telephone system, reporting that it was difficult to get through to an appropriate Fiscal to discuss the case. Conversely, some Fiscals said it could be difficult to contact solicitors, and saw them as rarely available in the office to take calls.
- 5.19 In this context, it should also be noted that sometimes the Fiscal will not know until the ID which solicitor is representing the accused. A number of measures have attempted to address this such as having a Fiscal available – for example via an 'ID surgery' on court premises – to discuss ID cases and having an acceptable plea hotline for solicitors to discuss acceptable pleas with a single point of contact within the Fiscal's office. However, these initiatives had mixed responses, appearing to have been successful in facilitating discussion between Fiscals and defence in some areas, but with uptake of such services by solicitors in other areas being described as poor.
- 5.20 Successful plea negotiation and discussion was also believed to be constrained, to some extent, by resources – the high volume of cases going through some courts and the perceived low number of staff and lack of court time to deal with them. This was felt to be impacting on the preparation of deposes –lack of time leading to inadequate preparation and inability to discuss cases – as well as on Fiscal decisions once a prosecution has been started:

So some of the decisions are .. look very much as if they're being done for convenience / cutting cost / cutting work, rather than in the interest of justice, so that's the first, and worrying, criticism because something is going to go badly wrong in that. (DSF 27)

- 5.21 On a related note, some defence solicitors believed that they will often be in a better position at TD to negotiate a better outcome for their client because Fiscals are under pressure to deal with a large number of trials, and some witnesses may fail to attend.
- 5.22 The effective management of local caseloads, such as limiting the number of trials in a court per day, was highlighted as a factor which, in some areas, was felt to have impacted positively on the level of preparation and subsequent likelihood of getting a guilty plea.
- 5.23 The 'acceptable plea' letter²⁰ was generally regarded as helpful, although some defence solicitors thought Fiscals were too inflexible in refusing to negotiate further. Although some fiscals clearly regarded the 'acceptable plea' as the bottom line beyond which they were not prepared to go, others took a more flexible approach. Several defence solicitors certainly thought that Fiscals were often too inexperienced and were either afraid, or not allowed, to exercise sufficient discretion.

The difficulties there tend to come in more from where the .. the Fiscals are getting their instructions from...[Interviewer: Right. Do you mean the acceptable plea letters or]

Yeah. Well, sometimes you find that younger, newer Fiscals, there's little or no point discussing anything with them because they're terrified to accept any kinda plea other than 'guilty as libelled' because they're scared they'll get into trouble from their boss and stuff like that. That's the difficulty in having discussions with Fiscals.[DST 1507]

- 5.24 Some solicitors felt that the inability to negotiate on acceptable plea letters in the light of new defence information was also a barrier to early discussion and negotiation to resolve cases.
- 5.25 Some issues concerning the fairness of acceptable plea letters also emerged. A number of Sheriffs suggested it may be unfair that acceptable plea letters are not issued to individuals without representation (which was often the case in many traffic cases), meaning that only those with representation may be able to secure a lesser charge. Another point, again, from a Sheriff was that there should be some scope for negotiating acceptable pleas in the light of new information gathered from precognitions.

The analysis of disclosable summaries

²⁰ An 'acceptable plea letter' sets out to the accused and his solicitor the terms under which the Crown are willing to accept a plea – for example, where someone is accused of multiple offences, which offences may potentially be dropped in response to an early plea.

5.26 For disclosable summaries to fulfil their policy objectives – particularly facilitating early investigation of the case and informing discussions between defence solicitors and Fiscals and plea decisions for accused persons – it is necessary that they provide an adequate level of information on the case. To examine the extent to which this was occurring, we analysed the content of 192 anonymised disclosable summaries²¹.

Methods

5.27 The disclosable summaries were assessed against a number of criteria, based on the ACPOS guidance contained in the ACPOS Disclosure Manual. Summaries were scored on a 5 point scale – a ‘5’ indicating that the information provided was entirely satisfactory. The ACPOS guidance explains that the COPFS ‘summary of evidence’ should be drawn from the following sub-sections of the police report: description of locus; description of events; police interview/text of admission; caution and charge/reply; and medical evidence. In addition to assessing the disclosable summaries against these criteria, an overall rating was given to each one and various other data was recorded about the nature of the case. These included: the broad type of crime involved; whether the accused was remanded in custody until the next court; and the PF case number. A number of defence solicitors were recruited to test the validity of the research team’s ratings.

5.28 The disclosable summaries were assessed by the research team on how satisfactory they were in terms of the information they might reasonably have been expected to include. Similarly, the defence solicitors who carried out the review of a small number of disclosable summaries were asked to assess them against the same standard.²²

Summary of analysis

5.29 The vast majority of disclosable summaries were rated as entirely satisfactory by the research team. In other words, they contained all the information that could reasonably be expected and in most cases the summary of evidence against the accused would be sufficient to allow the defence solicitor to advise his/her client on a plea. It should be noted that some of the five categories of information required under the ACPOS guidelines were not relevant in some cases and in these instances no rating of that category of information took place. For instance, medical evidence is very rarely relevant except in the case of assault, where the disclosable summary should describe the victim’s injuries. Similarly, in cases of speeding emanating from motorway speed cameras, the police interview/text of admission category is clearly redundant.

5.30 Only nineteen disclosable summaries were deemed to be missing some information that might reasonably have been expected to be included. An analysis of the background to these indicated that it appeared to make little difference whether the accused appeared from custody, despite the pressure to produce these very quickly in such cases. Nine out of 91 custody cases

²¹ A description of the sampling criteria used to select the summaries is included in Appendix C.

²² See Appendix C for fuller discussion of the methodological considerations given to this approach.

resulted in a less than satisfactory disclosable summary compared with eleven out of 101 non-custody cases. It is possible that the general pressures of work are similar in both situations or alternatively that more care is taken in custody cases because they are on average more serious, or that a combination of both factors is at work.

- 5.31 As regards those nineteen disclosable summaries that were deemed to be less than satisfactory, eight were assaults or breaches of the peace where it was not entirely clear which witness saw or heard exactly what. In other words, the police summary provided a general narrative of what happened but sometimes it was not clear which witness(es) saw which parts of the incident. Clearly, in these instances, the defence solicitor could not be sure if the key parts of the events were corroborated or were seen by only one witness. This finding did not surprise the research team because in a complex incident witnessed by various bystanders and participants, it may be difficult at the time for the police to disentangle who saw precisely what; and in such circumstances a general narrative summary may seem sufficient. Such detailed information may not become clear until full witness statements are taken.
- 5.32 There were also four shoplifting cases with only one witness where it might have been useful to know if there was any CCTV footage (even if the information was negative). In all these cases, the accused had admitted the offence so the single witnesses' accounts were corroborated and, therefore, the police might have elected not to make further enquiries.
- 5.33 There was no real pattern to the rest of the cases where potentially useful information that might have been expected to be included was not. For instance, with regard to one speeding offence, the disclosable summary did not state what the speed limit at that particular point on that particular road was.
- 5.34 Three defence solicitors reviewed a total of thirty disclosable summaries, twenty one of which had been assessed as entirely satisfactory by the researchers. The defence solicitors thought that twenty of these thirty disclosable summaries achieved this standard. It should be noted that there was not a perfect overlap between the assessments of the research team and the defence solicitors (i.e. the satisfactory set selected by the researchers was not the same as that selected by the solicitors), illustrating unsurprisingly that this type of exercise is not a perfect science depending as it does upon a largely impressionistic judgement. But it should also be noted that those disclosable summaries which were graded as less than completely satisfactory by either researchers and solicitors were only slightly so, most receiving overall grades of 4 with only a couple at 3. Overall, it can be said that the very limited peer review by defence solicitors confirmed that the quality of disclosable summaries is generally satisfactory.
- 5.35 Case trajectory information on the cases to which the summaries referred was supplied by COPFS. The trajectories and outcomes of those cases where the disclosable summary was deemed less than satisfactory was compared with those case with satisfactory summaries. A summary of the results is included in Table 5.1.

5.36 The very small number of cases makes it difficult to draw any firm conclusions from this exercise but the results are worth outlining nonetheless because they are extremely interesting. Further, it does seem to suggest that the evaluation of the disclosable summaries by the research team was to some extent successful in identifying those summaries which were less than satisfactory.

Table 5.1 Case trajectories and outcomes of cases selected for analysis of the disclosable summary

Quality of disclosable summary	N	%	Guilty plea at pleading diet (%)	Stage at which case concluded (%)			Avg. no. of times a case was called
				Pleading	Intermediate	Trial	
Sufficient	190	89	38	57	22	21	3.6
Insufficient	24	12	25	38	17	46	5.1
All	214*	100	36	55	22	24	3.8

*A single disclosable summary may be relevant for more than one accused person. However, the case trajectory information refers to accused individuals. Thus the number of cases on which there is trajectory information is higher than the number of disclosable summaries analysed.

5.37 It can be seen that the proportion of cases pleading guilty at the PD where the information in the disclosable summary was deemed insufficient was lower than where it was sufficient. This is exactly what one would expect because if the defence solicitor and accused do not have enough information about the strength of the case against the accused, the only sensible option is to plead not guilty.

5.38 It also seems that the proportion of very late pleas, i.e. at the TD, was much lower where the disclosable summary provided sufficient information. Again, this is very much what one would expect because, if the disclosable summary reveals a strong case against the accused, one would expect a guilty plea at an earlier stage. It can also be seen that the average number of times a case called was higher where the disclosable summary was lacking in some way.

Full disclosure

5.39 Although SJR did not change the existing processes of disclosure of evidence after the PD, the System Model underpinning the reform of summary justice (Scottish Government, 2007) made a commitment to improving the effectiveness of court diets, including through improvements to disclosure of evidence following a plea of not guilty. Data on the related timescales defined by the System Model has been discussed in Chapter 3. In this section, we explore some of the additional evidence related to the operation and practice of disclosure post-PD.

5.40 Full disclosure appeared to be working reasonably well, although experiences did vary between courts. Witness statements are reviewed by a specialist or senior officer before being sent to the Fiscal but usually there is no need to send them back to the reporting officer for improvement. Many of the Police interviewees commented on the resource involved in this process, with some feeling that the Police were now seeing an increased number of statement

requests. The timescales for providing the information to the fiscal were seen as challenging for some cases, particularly those which were more complex – e.g. involving a lot of witnesses - or where other factors created delays such as police leave, staff sickness, witnesses being unavailable or pressures of other work. Another view was that there is an increasing amount of CCTV evidence to be collated and reviewed and that this can be extremely time consuming.

- 5.41 Despite this, most of those interviewed were still generally positive about the operation of full disclosure. Indeed, one perspective was that, although there may be more to do on some cases, the overall number of cases had dropped. In addition, one view was that the timescales for full disclosure were reasonable.
- 5.42 Similarly, although Fiscals often commented that full disclosure had increased prosecution workloads prior to IDs, some also noted that this had to be set against the time saved by a greater number of earlier pleas. Some defence solicitors indicated that full disclosure was helpful in determining which witnesses they should see prior to trial and one or two commented that it could turn up additional witnesses (e.g. bystanders from whom the police had not taken statements). A couple of interviewees also observed that it reduces the burden on witnesses because the defence no longer require a precognition statement.
- 5.43 The relevant material tends to be disclosed to the defence by the Fiscal on a continuing basis, as it becomes available to the police, rather than as one comprehensive package. Several interviewees commented that there can be delays, sometimes requiring the continuation of the ID, in making full disclosure, particularly where CCTV footage and forensic reports are involved. Some defence solicitors complained that material was disclosed so close to the ID that there was insufficient time to prepare properly and advise the client and one or two Sheriffs shared this view. Indeed, observations in one court indicated it was not uncommon for full disclosure to take place at the ID with the pen drive being handed over at that point. There was some minor disquiet amongst defence solicitors about the pen drive system, principally because of difficulties in collecting it from the Fiscal and the costs of printing out the material upon it.²³
- 5.44 Again, a widespread view amongst interviewees, particularly defence solicitors, was how helpful full statements and CCTV footage can be, particularly when the potential evidence is highly incriminating. For instance, once accused have viewed or been told what the CCTV shows, particularly if they are unable to remember what happened, they will often take the advice of their solicitor to plead guilty at the ID. But, as noted at paragraph 5.15, several defence solicitors also observed that full disclosure sometimes did not bear out the disclosable summary, usually painting too rosy a picture of the prosecution evidence.
- 5.45 One perspective amongst police interviewees was that the Crown and Sheriffs were not being pro-active enough in questioning what they see as unjustifiable

²³ Note that since the time of the research COPFS have established a secure disclosure website where disclosable material is made available electronically for defence solicitors to download.

not guilty pleas at the ID in the light of the disclosed information. There was also a perception that some Sheriffs were still agreeing many last minute requests by the defence for adjournments on the grounds of not being fully prepared and some Fiscals called for Sheriffs to be generally more 'assertive', for example, questioning solicitors claiming that they had not had the chance to take instructions from their client. It was felt that Sheriffs could generally do more in moving cases forward more quickly by challenging, during IDs, defence solicitors who say they have been unable to take instruction from their clients. In fact, this already appears to be happening in some areas – but in relation to pleading and trial diets - with Sheriffs also applying a stricter approach in granting 'continuations without pleas' (CWPs) without good reason and adjournments of summary trials by challenging the defence on their preparation. Some increase in CWPs was expected (and occurred as shown in chapter 3) following SJR. These allow more opportunity for defence solicitors to discuss the disclosable summary with their client thus potentially securing an appropriate guilty plea and preventing an unnecessary not guilty plea with the case then moving to ID and the additional work this sets in motion. However, the suggestion was that such continuations would not be granted automatically and without good reason by these Sheriffs.

- 5.46 For example, Sheriffs in Court C described a 'collective approach' they took to improving efficiency, querying solicitors who frequently requested further IDs and not allowing cases to continue unnecessarily.

And so...I think probably four/five years ago we as Sheriffs actually sat down and discussed these matters to see what we could do on a collective basis to make efficiencies in our own court...So...things that can block the system, like a pleading diet calls and the agent asks for it to be continued without plea, to take instructions. And then when it comes up three weeks later continue without plea again, I need to take instructions. Or intermediate diets call and the agent says would you continue this for a week because I am waiting to trace a defence witness, whatever it is. We are very rigorous in not allowing cases to be churned like that for no good reason. [SHF 18]

- 5.47 It is notable that this court has consistently recorded the highest guilty plea rates at PD (see Figure 3-C) and has had a consistently higher proportion of cases concluded within 20 weeks than the other case study courts (see Figure 3-G).
- 5.48 Most Fiscals and many defence solicitors thought that full disclosure meant the defence was better prepared while the rest suggested that it had made little difference. A commonly held view, particularly amongst Sheriffs and Fiscals, was the perceived move to 'trial by statement', a result which they did not welcome. Their main concern was the way in which witnesses are confronted by the defence with minor and unimportant discrepancies between their testimony at trial and statements made months previously.
- 5.49 The disclosure of CCTV footage was commonly seen as problematic. Issues raised amongst police officers included the sheer volume of material that may be available and other interviewees referred to technical problems – getting the

footage into the right format to be viewed by the defence and by the court – which were seen to be a recurring factor in delay, but there was general agreement that the situation was improving. The court observations confirmed that such problems occasionally, but not often, resulted in an ID having to be continued. Forensic and other expert reports – for instance, the confirmation that seized substances are in fact illegal drugs – were also commonly raised as a key cause of delay. One view amongst police officers was that there are sometimes difficult issues surrounding sensitive information, for instance, the existence or identity of a covert source. In addition, some practitioners raised fears about the impact of a perceived lack of sufficient resource – also noted above, see paragraphs 5.20 and 5.21 – related to COPFS staffing and workload and therefore their ability to get cases ready for the ID.

You see, they don't have the time here to even read the case before they come in. You know what I mean? That's the problem. It's something that the .. I mean I know, just from watching them, the first time they'll open some of these papers is when they stand on their feet and say, "My ..". [SHF14]

- 5.50 For the accused interviewees, the nature of their persistent offending, substance misuse and unstable circumstances, meant that they depended entirely on their solicitor to advise them on what to do as they seldom remembered the circumstances of their offences or the charges brought against them, and may not have kept hold of any of the original paperwork. Thus, they were primarily dependent on, and deferred to, their solicitors to represent their best interests and many therefore suggested that solicitors needed the paperwork in advance of subsequent diets, so as to avoid the likelihood of adjournments:

I can only speak from my own experiences but, no, I don't think [solicitors] get [the paperwork] in enough time... And they just had to go on what we hear on the day... We've also had an experience where the lawyer... the lawyer told me that he hadn't seen the evidence. I hadn't seen any of the evidence and when we went up to court, we've asked to have, you know, the case recalled on a different day, so we could get a chance to look at the evidence against me, and the Sheriff refused to recall the case (AF3).

Disclosure, delay and churn

- 5.51 It was clear from the court observations that there was still churn in the system and that at least some of it should have been avoidable. A large number of PDs were either continued apparently without good reason or a plea of not guilty was entered, leading to the scheduling of IDs and TDs. It seemed unlikely, in view of the overall statistics of summary justice, that most of the latter cases would actually proceed to trial. In particular, it seemed to be common practice for accused not to attend the PD and for their solicitor to tender a not guilty plea. The circumstances in which this occurred were not clear, but it may simply be that the accused had met his or her solicitor beforehand and agreed on a plea of not guilty and so was not necessarily a barrier to early pleas. A number of IDs were continued, although in many cases another ID was inserted where

necessary but the date of original TD remained unchanged (e.g. see Figure **3-E** and the surrounding paragraphs in Chapter 3).

- 5.52 During the course of our research, a number of LCJBs were undertaking a survey of reasons for adjournments and continuations. From the resulting data, we extracted a sample of almost 500 continued IDs, covering four Sheriff Courts, one of which was one of our selected courts. While two of the courts used a different pro forma for collecting information on the reasons for continuations from the other two, it proved possible to reconcile the data by widening the categories of reasons. The information indicated that across the four courts, 23% of all continuations of IDs were caused by disclosure problems, ranging from 16% of all such continuations in one court to 34% of ID continuations in the fourth. Disclosure issues were the single biggest reason for continuing an ID, closely followed by non-attendance of accused or co-accused (21%) and the need for further investigation or a lack of preparation (19%). Thus, it is possible that disclosure is a more common cause of delay than our limited observations would indicate, although these statistical data also have to be treated with caution. Whatever the extent of the problem, it is probable that some of the delays due to disclosure were avoidable (e.g. failure to provide full statements) while others were not (e.g. report from crime laboratory not yet ready) in that they were out of the direct control of the court and practitioners.
- 5.53 Clearly, then, disclosure is a significant issue in relation to delay and churn. However, as these data suggest, it is not the only aspect of summary process post-PD which is contributing to the delayed resolution of cases. Views on other key factors influencing delay will be considered in the next chapter.

6 THE INFLUENCE OF OTHER FACTORS ON ACHIEVING THE AIMS OF THE REFORMS TO SCLA AND DISCLOSURE

- 6.1 Analysis of the impact of the changes to SCLA and disclosure on case outcomes, case preparation, pleading advice and the effectiveness of court diets in the previous chapters has shown that separating out the independent effects of the changes to SCLA and the changes to disclosure is difficult. Indeed, many of those interviewed saw the changes which had occurred as attributable to a combined effect of both sets of reforms. However, in the course of the qualitative research, interviewees also referred to a range of other factors already present in the summary justice system, or changes which occurred alongside those to SCLA and disclosure, which they believed were preventing or facilitating the achievement of the specific objectives of the reforms to SCLA and disclosure or the wider aims of summary justice reform.
- 6.2 Some of these factors and changes have already been discussed. In particular, Chapter 3 highlighted the significant change in the distribution of summary justice business introduced by the expansion of DMs and a wider set of powers for JP courts. This chapter summarises the other main contributing factors which were mentioned, by a range of interviewees, in the course of the research.

Perceptions of how other factors affect early case preparation

- 6.3 A number of other issues were seen by interviewees as influencing early case preparation, including the nature and level of contact between defence solicitors and their clients.
- 6.4 For example, one view held by a Fiscal was that because of the reduction in summary business – a belief evidenced by the data detailing the decrease in summary court cases in Chapter 3 – many legal firms are having to maximise their income by taking on more cases, thus spreading themselves more thinly and struggling to find time to deal with each case properly. A similar view suggested a move back to ‘the bad old days of poaching’, where legal firms attempted to take on clients from other firms.
- 6.5 At face value, this is a confusing picture: if there is less summary business but a similar number of defence solicitors it appears illogical that solicitors would be busier. However, one defence solicitor suggested that the downturn in available business had resulted in firms reducing the number of solicitors undertaking criminal work, meaning that those who remained were busier than previously was the case.

...the main problem we've had is the volume of work. [Interviewer: In what sense?]:

It's down because of the direct measures...[Interviewer: So what impact does that then have on how you conduct your business?]

It means that we are an awful lot busier. It means that we are busy, very busy usually between about ten o'clock and twelve o'clock, or one o'clock everyday

because there are not many other people here doing court...criminal court stuff at that time so we're having to be in a lot of places at once [DSF 32]

- 6.6 As noted in Chapter 4, accused interviewees sometimes felt that their solicitor was very busy and that this impacted adversely on the service received – for example, they may have to explain their case to several solicitors and/or be represented by a replacement solicitor at court. In the latter situation, the replacement solicitor – being less familiar with the case – may be unclear about the facts and therefore fail to properly represent the client, and/or ask for an adjournment on behalf of the client's usual lawyer, delaying the process even further:

Sometimes it's annoying because you have to repeat... you have to basically repeat some of the stuff that you've already told the other lawyer... or you realise the other lawyer has not... got it exactly right what you said the first time, so you've... you correct him before he goes into court (AF1).

I went to speak to my solicitor at the time but the guy that was supposed to be representing me, he wasn't there and he was called away, so it was his partner... [who] didn't really explain to me properly what was happening, you were just left guessing most of the time... I would just like to have got it done and dusted straight away (AF12).

- 6.7 Arguably, these perspectives simply reflect general issues around how solicitors deliver their service rather than a situation which has been created by summary justice reform. However, SJR was intended to improve case handling through early, effective preparation and increase perceptions of fairness in the summary system. Furthermore, the changes to SCLA were specifically aimed at supporting the availability and delivery of sufficient criminal defence services of an appropriate quality. These perceptions amongst accused interviewees would suggest that, for some, these aims and outcomes have not been achieved.

Impact of other factors on plea decision-making

- 6.8 Previous research carried out in Scotland (Samuel 1996; Goriely et al 2001; Stephen and Tata 2006) highlighted a number of influencing factors which can act to influence the likelihood of an early plea: the time constraints which defence solicitors and depute Fiscals work under, especially at custody diets; the influence of remand (accused persons may prioritise an immediate release from custody and may accordingly plead guilty to avoid being remanded); the accused person's attitude to risk of conviction; and views about individual Sheriffs (some are viewed as being more punitive than others and some are known to be more proactive in managing cases). These same drivers of pleading decisions have also been highlighted by interviewees in this study.
- 6.9 Sentence discounting was perceived by a number of interviewees (Fiscals, defence solicitors as well as some accused) as having had a considerable influence on early pleas. However, some solicitors and Sheriffs felt that this

had limited impact for summary cases, not being a huge influence for the 'average criminal' [DST 1201]. Where discounts were used, a number of Fiscals commented that these were not applied as strictly by some Sheriffs, who – it was reported – have still granted discounts to those pleading on the morning of their trial. In addition, one perspective amongst defence solicitors was whether discounts were as real as they seemed. For example:

I am far from convinced that there is such a thing as a discount. For example, the average fine for driving without insurance in [name] court has always been £300 and now the fines are £300 and now the only difference is that the notional starting point is £360. So I'm not at all convinced that for summary work that it even exists. They take a higher notional starting point [DST 1568].

- 6.10 Nevertheless, one view amongst accused interviewees was that pleading not guilty and being found guilty might extend the level of sentence:

I think if I pled not guilty the whole way, I might have maybe got longer in prison [AF12].

- 6.11 Interviews with both practitioners and accused persons suggested that some accused will plead guilty from the outset if bail is opposed, in order to avoid being remanded in custody. For accused respondents, getting a case resolved quickly appeared to be related more to outcomes (e.g., avoiding remand), whereas the 'quick and simple' philosophy behind the summary justice reforms relates more to process. One perspective was that if they had previous convictions, being remanded would be inevitable, and therefore they would be better off pleading guilty from the outset. This was one reason why the majority suggested that pleading guilty (irrespective of whether they perceived themselves guilty) reduced the overall length of the disposal and got it resolved speedily:

'It's not that good sitting on remand not knowing when you're going to get out [AF10].

- 6.12 The analysis of guilty plea rates and case trajectories in Chapter 3, particularly that illustrated by Figures 3-F, 3-G and 3-H appear to suggest that from the initial sharp increase in 2008-9 there has been a slight decline in the rates of disposals at the PD and a levelling off from the earlier sharp decline in the rates of disposal at ID. This is slightly puzzling. One might expect that as disclosure improves and beds down and the financial structure of front-loaded legal aid payments continue to take effect and are reinforced by a judiciary which is more focused on case management, the rates of early guilty pleas would continue to rise rather than a discontinuation of that trend.
- 6.13 One possible explanation might have to do with the impact of the proportionately more serious caseload in both the Sheriff and JP courts. All else being equal, cases with more serious charges and multiple accused tend to have lower rates of early guilty pleas. The continuing increased use of DMs for more minor cases and cases which might previously have been prosecuted in the Sheriff Court going to the JP Court (see Figure 3-A) may

have had an impact on early guilty plea rates. That is, the types of cases which are now being dealt with by DMs, and those which have been shifted from the Sheriff to the JP court, are those which were more likely to have involved an early guilty plea. Furthermore, the phased roll out of JP courts via the unification process would also have meant this impact would have occurred at different times in different courts over a reasonably prolonged period.

- 6.14 Another possible explanation is that despite the radical reforms, there remain, from the accused's perspective, rational reasons for not pleading guilty at the first opportunity. An enduring feature of plea negotiation is that the defence is more likely to be able to gain significant concessions (charge reduction/deletion) at the ID than at the PD (see, for example, Du Plooy vs. HM Advocate, 2003; Duff and McCallum, 2000; Chalmers et al, 2007; Goriely et al 2001; Stephen and Tata 2006). Although pleading guilty at the ID risks diminishing the sentence discount in recognition of an early guilty plea, this might be felt to be well worth the risk if it means a very significant reduction in the level of charges. Furthermore, where a custodial sentence is considered unlikely the impact of any discount (e.g. to a fine) might be considered, in the accused's subjective terms, to be small. Indeed, research into the reforms to fines enforcement has suggested that some accused have neither the means nor the intention to pay financial penalties (Bradshaw et al, 2011).

You can negotiate a better deal at the intermediate diet as a rule. [DST 1659].

- 6.15 Relatedly, although the shifting of less serious cases from the Sheriff Court to the JP or Stipendiary Courts was viewed as having freed up court and Sheriff time to deal with more serious cases, there was a concern that the increased caseload in some JP courts and the Stipendiary Court meant little time was available to discuss pleas and facilitate early resolution of cases. One view was that having too many trials risked lesser pleas being accepted by some Fiscals – e.g. increasing the likelihood of a guilty plea by dropping a greater number of charges than would normally be the case - in the interests of reducing the number of trials and reducing delays. This factor would potentially influence the solicitor and accused's decision of when to offer a plea.
- 6.16 Similarly, there was a perception among some Fiscals and Sheriffs that some local defence solicitors are generally less likely to advise a plea at an ID. One of the reasons suggested for this was they have not had the time to prepare properly – an explanation which may be influenced by the perceived increase in some solicitor's caseloads and the resulting impact on the amount of time for each case noted above – and put off decisions until a later date.
- 6.17 A third reason may relate to what defence solicitors said was the increased likelihood of summary criminal legal assistance (especially ABWOR) applications being refused by SLAB – on the grounds that representation is not necessary 'in the interests of justice' (especially the likelihood of a custodial sentence) – after the case had been disposed of and the work had been completed. It was suggested that this is starting to present firms with a choice: advise an early guilty plea but risk the possibility of not getting paid or

advise a not guilty plea with a better chance of getting legal aid and continuing the case.

There have been numerous occasions, and again it's a common theme across solicitors' offices, and we get a response from the Legal Aid Board saying 'we don't consider ABWOR to be appropriate in these circumstances', which means that basically after we've done the work we're then being told we're not getting paid, which is very frustrating.[...] And what's happening now is that there are some firms of solicitors who've taken the view that it's not worth the risk. And they are reverting to the previous system of tendering pleas of not guilty: you are more likely to be granted legal aid. [DST 1647]

- 6.18 The attitudes of accused and their assessment of the likelihood of a case going ahead also affects plea decisions. Solicitors suggested that many clients, especially regular clients, will delay consulting with them until the last minute while some will put off giving a guilty plea until they see which witnesses turn up at the TD. Conversely, some accused persons were perceived as wanting to get their case resolved quickly.

Other factors causing delay and churn

- 6.19 Disclosure is not the only cause of delay and churn at this later stage in the system. Interviewees described a range of other issues – some of which have been discussed already – which contribute to the delay. In particular, participants talked about the attitudes and influence of key players in the system. The influence of the behaviour and practice of Sheriffs, defence solicitors and Fiscals has already been noted, but the actions and attitudes of accused persons and witnesses was also perceived to be important.
- 6.20 Solicitors reported that many clients, especially regular clients, will wait until the last minute before consulting with them; also that some will delay giving a guilty plea until they see which witnesses turn up at the TD. Conversely, some accused persons will wish to get their case resolved quickly.
- 6.21 Witnesses not turning up for court was viewed as a major barrier to the efficiency and effectiveness and speed of the system, and was described by a number of clerks, Sheriffs and Fiscals as one of the main reasons for trials being adjourned – something also demonstrated by the monitoring data (see Table 3.5). Related to this, some concerns were raised about the way witness citations are served; one suggestion was that – perhaps because postal citations require the recipient to return an 'acknowledgement of service' to the Fiscal, and that this often does not occur - there is no way of confirming whether they have been received and therefore no opportunity to issue a warrant. This is not an issue when the citation has been personally served. The central citation service was seen by some Sheriffs as problematic when witnesses did not appear, as the depute is unable to show the necessary proof of service. Some suggestions to save time and money involved extending the use of police or ex-police personnel to hand-deliver citations in more cases.

- 6.22 Amongst accused persons, some felt that they had not been conscious of any delays in recent court cases. On the other hand it was also suggested that there had been unnecessary delays:

[The delay is] no 'cause of my Lawyer... it's usually with the courts and PF... [Interviewer: What, the PF or the police or the witnesses?]. It can be any one of them, any one. [Interviewer: And do you know what the delays are?]. It can be anything, it can be anything at all. A camera, the camera, it needs a... or witnesses who don't want to go to court again. There's that many things...all sorts of stuff... It could be anybody, witnesses or police officers, they're always away on holiday (AF5).

- 6.23 Administrative issues with applying for legal aid payments were perceived by some to generate delay and have a resultant impact on solicitor behaviour and case preparation. Defence solicitors were generally positive in their comments about the on-line system of applying for legal aid. However, a particular change in the way they deal with clients mentioned by solicitors was an increase in the time required for legal aid applications, including having to chase clients for financial details. Indeed, solicitors tended to express frustration about what they perceived to be an unnecessarily pedantic approach to the provision of evidence of the accused's financial status, which could be very time-consuming²⁴.

I've also noticed the Board are getting more pernickety about wanting to see proof of income, you know? even .. even in cases where most people I would have thought, you know, objectively looking at it, that it's obvious the guy doesn't have any kind of income. So I have found the Board are getting more and more difficult to deal with, and that unfortunately is taking up a lot of time. [...] I have heard a lot o' colleagues moaning that we're spending much longer getting the legal aid grants than actually getting the statements in and getting the client in and doing the case as it were. Much more of our time seems to be spent on getting the client in and getting her, getting him to copy his bank statements and getting him to give us letters from the Jobcentre that we've then got to scan off on to the computer and send it off to the Board. [DST 1507]

- 6.24 The time involved in applying and being granted legal aid was an issue raised by some Sheriffs and clerks, who pointed out that waiting to hear about legal aid was still a factor causing delays in cases progressing, although in other areas clerks felt there were fewer cases being put off due to legal aid delays. Problems such as these can be caused when the defence solicitor changes. Such change can also cause delays in disclosure, which can only be effected if the Fiscal knows who the defence agent is.
- 6.25 It is clear, therefore, that interviewees perceived a considerable range of other factors and changes present in the summary system at the same time as the

²⁴ Note that this perception reflects views at the time of the interviews. The research team have been informed that these application are now more straightforward to complete although it is unclear whether defence solicitors will perceive this to be the case.

reforms to legal aid and disclosure, to be affecting the extent to which the SCLA and disclosure reforms could achieve their aims or contribute to the higher level outcomes and objectives of SJR, including increasing the rate of early guilty pleas.

- 6.26 Indeed, according to one interviewee, it was the acknowledgement and exploitation of this necessary combined effect, incorporating an agreed 'collegiate' pro-active approach amongst the Sheriffs in that court, which had led to an increase in early pleas:

So...we understand about the Legal Aid changes, we see the disclosure taking place, and there is the sentence discounting which is I think a major issue. And when you put all these factors together and combine it with the collegiate approach we have here, which to a very large extent has got rid of any notion of Sheriff shopping, we are very conscious of that, and if we see the slightest hint of it we come down on it like a ton of bricks... So...the effect of that is that we get a lot of pleas of guilty first pop. A lot of pleas of guilty, pleading at the diet stage, and at the custody stage, and if we don't get it then, then again probably because of discounting we get a reasonable number of pleas of guilty at the intermediate diet stage (SF 18)

7 CONCLUSIONS

Introduction

- 7.1 In this final chapter, we summarise the main findings of the research in terms of the extent to which the reforms have achieved – and are *seen* by key actors to have achieved – their specific objectives; consider the contribution that the reforms to summary criminal legal assistance and disclosure have made to the wider project of summary justice reform; and discuss ways in which aspects of legal aid, disclosure and the wider system might be further improved.

Have the reforms achieved their specific objectives?

- 7.2 To recap, the reforms to summary criminal legal assistance aimed to ensure appropriate remuneration for solicitors, reduce bureaucracy and support the availability of defence services of a sufficient quality. The reforms to disclosure were focussed on improving early investigation, informing discussions on plea decisions between solicitors and their clients, and supporting more effective pleading and intermediate diets. Both sets of reforms were intended to facilitate the resolution of cases at the earliest possible stage.

Summary criminal legal assistance

- 7.3 Evidence from the survey of defence solicitors is unequivocal on the topic of remuneration: three-quarters *disagreed* that defence solicitors were now given a suitable level of remuneration to undertake summary criminal work of an appropriate quality. However, there is little evidence, from the quantitative data on SCLA payments, to indicate that ‘per case’ remuneration following the reforms is actually very different from the position pre-reform.
- 7.4 That said, the decrease in summary court cases and the number of legal aid grants do illustrate the significant drop in potential business now available to solicitors. Despite this, many interviewees believed that individual defence solicitors were busier – possibly because firms have reduced the number of staff working on criminal cases. Some felt that higher individual caseloads, in combination with perceived limitations associated with the fixed fee in terms of the ability to fully prepare and investigate the case, had reduced the quality of representation and was less fair to clients. A minority, however, felt that the time spent on some cases was balanced out by other less complex cases being resolved fairly quickly.
- 7.5 In terms of reducing bureaucracy, the evidence is mixed. Some interviewees were critical of the online system of applying for legal aid – although this was not a specifically SJR initiative. Others took a more positive view of the online system, regarding it as quick, although there was some concern that the need to provide evidence of a client’s means, particularly if they were on benefits, could be very time-consuming (subsequent changes to the system mean this may be less an issue now). Other interviewees, particularly Sheriffs and clerks, and the data from the court recording exercise, suggest that legal aid applications do still cause some delays at later stages of the court process.

- 7.6 It is difficult to assess changes in the availability of appropriate defence services as a result of legal aid reform. The reduction in the volume of summary court business and legal aid grants might have been expected to impact on the supply of criminal legal services, and many defence solicitors interviewed for this research felt that that this had happened. However, data on the number of solicitors applying for legal aid suggests there are more now than two years ago. In addition, in a SLAB survey in spring 2010, 15% of criminal defence solicitors felt there were too many legal assistance solicitors in their local area (MVA Consultancy, 2010) and most (66%) felt the number was about right. Only one in ten (10%) of those who took part in the SLAB survey felt there were now too few legal assistance solicitors in their area.
- 7.7 Accused interviewees certainly did not report difficulty in obtaining the services of a solicitor. But there was a clear perception among accused that their solicitors were busy and, as a result, had limited time to spend discussing a case with them. Of course, there may be various factors at work here, including the perceived restrictions - among defence solicitors - of the fixed payments on case preparation and investigation, as from the overall reduction in potential business.
- 7.8 Although most solicitors (60%) did not believe their level of client contact had changed since the reforms, some did. That said, a reduction in client contact does not automatically equate to a poorer quality defence service. Indeed, many felt that the reforms had led to fewer, more productive client discussions - a factor attributed by some to the availability of the disclosable summary. The reforms to SCLA, whilst altering the value of certain grants and, in particular, introducing a higher early case disposal fee, did not change the 'fixed' nature of payments. Despite this, the fixed nature of SCLA payments featured amongst the views of many defence solicitors on their client contact. For some, fixed payments were felt to limit the level of service they were able to offer, restricting their ability to properly prepare for and investigate the case or acted as an incentive to undertake less work on the case - both of which were linked to a lower quality of service and a notion of reduced fairness for the accused and potential miscarriages of justice.

Disclosure

- 7.9 Many of the practitioners interviewed for the research believed that the introduction of disclosable summaries had been useful in facilitating early and more focused investigation of the case and discussions with the PF and clients. Around two-fifths of defence solicitors responding to the postal survey thought that disclosure had led to more early discussions about cases with Fiscals. However, a similar proportion perceived there to have been no change with a minority reporting fewer discussions.
- 7.10 Interviewees identified a number of remaining barriers to early and effective defence-Fiscal discussions. Both parties, for example, reported difficulty in contacting the other. Although a number of initiatives had been piloted to improve this, the impact of these was inconsistent from area to area. Available resources and subsequent caseloads were also mentioned. Fiscals were perceived to have limited time available to prepare for or discuss cases, though

there was also a view that defence solicitors have limited time to discuss cases. In addition, the acceptable plea letter was believed to limit discussion and negotiation in some cases.

- 7.11 It was widely held, though, that disclosable summaries acted as a useful aid to solicitors in discussing plea decisions with their clients - most defence solicitors in the survey certainly reported this to be the case. Summaries were felt to be particularly useful in cases where the client was unable to recall the circumstances of the offence and in custody cases where, by demonstrating at an early stage the strength of the prosecution's case, defence solicitors were better placed to convince their client of the likelihood of a conviction at a later stage and to suggest the benefits of an early plea (in terms of avoiding remand or receiving a discounted sentence).
- 7.12 However, the quality of the summary was deemed to be important in influencing this discussion. Although the quality of summaries was generally felt to be good, some concerns were raised – by both defence solicitors and Fiscals – about summaries in more complex cases and about the reliability of some police accounts of civilian statements. The quality of the summary also appeared to influence the likelihood of an early plea. Although limited in number, the case trajectories for the sample of cases where disclosable summaries were analysed tentatively suggest that, when the summary is of good quality and contains all the necessary information, there is a greater likelihood of an early plea.

Facilitating early resolution of cases

- 7.13 Both sets of reforms were aimed at facilitating the resolution of cases at the earliest possible stage in proceedings. Analysis of the monitoring data indicates a clear rise in the guilty plea rate at PD following the introduction of the reforms and solicitors reported advising clients to plead guilty on the basis of evidence contained within the disclosable summary. In the survey of defence solicitors, many interviewees indicated that they were now more likely to advise a guilty plea and/or that other solicitors were more likely to do so. However, solicitors were more likely to attribute this to a combined effect of both sets of reforms rather than the independent effect of either changes to legal aid *or* disclosure.
- 7.14 Indeed, the difficulty of attributing an independent effect to one reform rather than the other was a recurring theme among practitioners. The monitoring data indicate a small increase in the rate of guilty pleas at PD following the introduction of disclosure but in advance of the changes to legal aid, and a more notable increase following the legal aid reforms. However, as the changes to disclosure were already in place when the legal aid changes were made, identifying the independent effect of legal aid is difficult. Some Fiscals and solicitors took the view that the revised legal aid arrangements act as an incentive to get things moving more quickly. But legal aid and disclosure were generally seen as acting in combination to increase the rate of early pleas.
- 7.15 In addition, the evidence in Chapter 6 clearly suggests that many other factors and changes in the summary system are seen to have influenced pleading

decisions and the stage at which cases are resolved. In summary, these include:

- Sentence discounting, particularly where a custodial sentence is at stake
- Bail opposition and the risk of being remanded
- Changes in court business, Fiscal workloads and court scheduling
- The perception that negotiation will gain more concessions for the defence at ID
- A belief that there had been an increase in refusals of ABWOR by SLAB after the case had been disposed of
- Whether or not Sheriffs adopt a pro-active approach in questioning not guilty pleas or reasons for adjournments
- The perceived likelihood, among accused and their solicitors, that the trial would ultimately go ahead as scheduled.

To what extent have the reforms to legal and disclosure contributed to the overall objectives of summary justice reform?

7.16 The overarching objectives of SJR were to create a summary justice system that is: fair to victims, witnesses and accused; effective in deterring, punishing and helping to rehabilitate offenders; efficient in the use of time and resources; and quick and simple in delivery.

Fairness

7.17 There was a general perception among practitioners that fewer trials going through court should leave more time to deal appropriately with those which proceed - something which would make the overall system fairer. There was a lack of consensus, however, about the specific impact of the reforms to summary criminal legal assistance and disclosure on fairness of the summary justice system.

7.18 As noted above and in Chapter 4, although not directly related to the reforms to legal aid and disclosure, the restrictions imposed by the fixed nature of SCLA payments were felt by some solicitors to be unfair on clients because of a perceived negative impact on time spent on case preparation and investigation (including fewer custody visits, less client contact, less travel). Investigating complex cases was seen as especially challenging within the fixed fee system, and some solicitors were concerned that they have to rely on the summary and police report as the only available evidence, whereas previously they might have conducted their own precognitions. This is of particular concern because these are cases for which the summary of evidence is more likely to be perceived as insufficient and which would therefore require further investigation. It is notable though that exceptional case provisions, which provide additional legal assistance funding, are available for some cases of this nature.

7.19 Disclosure was generally viewed (by Fiscals, police, court staff, and to a lesser extent defence solicitors) as being fairer to accused persons, in that it equips them to make a more informed decision about their case. In addition, because

this information is supplied early, accused persons are able to make decisions quickly, speeding up the conclusion of a case – something seen as fairer for all parties, not just the accused. Interviews with accused persons revealed a similar view on disclosure, which they believed as essential to ensure the process was just and fair. Indeed, having a summary of evidence was seen as particularly useful for some accused who may have had difficulties in recalling the details of an incident. However, some defence solicitors felt that disclosure had not made an impact on fairness to the accused. Furthermore, some Fiscals questioned whether the one-sided nature of disclosure, where the defence are not required to reveal their position to the Crown, is particularly fair.

- 7.20 Accused interviewees tended to view the system as generally fair, with little change in fairness noted since the reforms. That said, some felt that they were not listened to or respected by solicitors or Sheriffs. And although most were pragmatic about the process, the evidence and disposals, some felt limited in their ability to influence how the case is considered and taken forward.
- 7.21 Most practitioners interviewed for the case studies thought that the system was fairer to victims and witnesses because of disclosure, in that it facilitated early resolution of cases, and meant there was a less need for victims and witnesses to come to court. On the other hand, the use of ‘trial by statement’ which had occurred following the changes to post-PD disclosure was believed to impact unfairly on victims and witnesses. This was considered particularly problematic for ‘regular’ witnesses such as those working in the retail sector, who may find it hard to differentiate between incidents, or those witnesses cited for incidents which were a long time ago. Some interviewees suggested that initiatives were underway to try and reduce this negative impact, for example, by allowing witnesses to read their statements.
- 7.22 However, other practitioners viewed the reforms as having had no impact on fairness to victims and witnesses - for example, 59% of defence solicitors surveyed felt there had been no change in this respect. Some clerks and solicitors felt that sending witnesses away on the day continues to be an unavoidable part of the summary process a perspective partly supported by the monitoring data which indicate that TDs are just as likely, if not slightly more so, to be adjourned following the reforms.

Efficiency, effectiveness and speed

- 7.23 The key trends in the monitoring data – the reduction in overall volume of Sheriff court business and move towards earlier pleas - were also largely recognised by practitioners, most of whom felt the courts were operating more smoothly, efficiently and effectively than before. However, this was not necessarily the case in relation to all courts. In some JP courts, for example, the perceptions were of no reduction in caseload, some practitioners also perceived timescales as remaining long with considerable churn, especially at the trial stage of the process.
- 7.24 In considering the extent to which the legal aid and disclosure reforms have impacted on efficiency, effectiveness and speed, participants tended to focus directly on the impact of disclosure, although it is possible that impacts of legal

aid may be embedded in general comments about the impact of summary justice reforms as a whole on efficiency, effectiveness, etc.

- 7.25 Some of the benefits of disclosable summaries were seen as directly contributing to a more effective and efficient system. Disclosure was seen as facilitating early case resolution, better case preparation, and some time saving for both Fiscals and solicitors. It was seen as allowing accused persons to make more informed and earlier decisions on how to plead – a point made by Sheriffs, Fiscals, defence solicitors and accused persons alike. Disclosable summaries were also seen by some Fiscals and solicitors as facilitating earlier negotiations and productive discussions between the Crown and defence, who could both use a ‘common hymn sheet’. Some Sheriffs and Fiscals felt that disclosure has resulted in fewer cases being put off due to one party not being adequately prepared, and there were comments that the new process of disclosure saved time for Fiscals (they no longer need to provide lines of evidence and administrative staff no longer need to photocopy statements) and defence solicitors (in not having to spend time collating statements and in determining which witnesses they need to see prior to trial). Performance against timescale targets, related to full disclosure, was also felt to have improved.
- 7.26 However, some aspects of disclosure were felt to impact negatively on efficiency and effectiveness. Fiscals in some areas perceived that their workload had increased considerably as a result of the increased administrative burden of full disclosure – which also had an impact on the police – even outweighing any efficiency gains from summary justice reform. Others were unsure that having fewer cases coming through the system would balance things out. However, the new web-based disclosure system was felt by some Fiscals to be helping in reducing the amount of time they needed to spend on disclosure as well as providing confirmation when the information has been accessed by the defence.
- 7.27 Disclosure was still the cause of significant delay at IDs, as was a lack of preparation. One perspective, particularly amongst Sheriffs, was that delays were resulting from defence solicitors attempting to investigate all information that had been disclosed (some of which was considered to be irrelevant to the case). They also pointed out that, although timescales had improved, the defence may still not receive the information early enough in advance of the ID - a point also made by some defence solicitors and Fiscals.
- 7.28 The discussion in Chapter 5 indicated that some defence solicitors felt the information provided by disclosable summaries was insufficient for them to advise their clients properly – particularly in complex cases – providing, at best, a ‘flavour’ of the case, and that full disclosure was necessary in order to do this. Last minute adjournments due to the defence not being fully prepared were said to be still occurring in some areas.
- 7.29 The economic analysis demonstrated considerable savings in terms of the cost of processing Sheriff summary cases following the legal aid and disclosure reforms. However, the main savings to the system have arisen from a change in sentencing practice, significantly fewer cases being dealt with in the courts

and a corresponding reduction in legal aid applications – none of which was influenced by the reforms to legal aid and disclosure. Some savings do appear to have occurred as a result of the increase in early guilty pleas – a change which can be attributed to these reforms - however, these have been offset to some extent by the increased likelihood of adjournments.

- 7.30 Sheriff summary cases are more likely to have a guilty plea at PD now than in the pre-reform period. Nevertheless, overall, these *court* cases were less likely to be disposed of within 20 weeks post-reform than pre-reform. Nor has there been much reduction in the average number of diets per case in the period since the legal aid and disclosure reforms. However, the overall shift in the distribution of summary business, with a significant proportion of court business now being dealt with by DMs, makes a like-for-like consideration difficult, as Sheriff courts now deal with a greater proportion of serious and complex offences.
- 7.31 The majority of solicitors surveyed (57%) felt the reforms to legal aid and disclosure had made no difference to the speed of cases coming to trial, while 29% felt that things were now quicker (mostly driven by disclosure although also a combination of both legal aid and disclosure to some extent). The majority of solicitors surveyed (53%) disagreed that cases are better prepared and subject to less delay, and half (50%) felt there was no change in efficiency as a result of legal aid and disclosure.
- 7.32 Our calculations suggest that around 62% of Sheriff summary cases post-reform result in a guilty plea. On average, around half of these are tendered at the PD, meaning the remainder occur later in the process - suggesting scope for some further improvement in this regard. However, many practitioners emphasised that, for a variety of reasons, some cases will always result in late pleas. Relevant issues here include the attitudes of accused persons; the availability or non-appearance of witnesses; lack of court time; the individual court culture; difficulties in communication between defence and prosecution; perceived under-funding of the Fiscal service; and sometimes disclosure problems.

How might the processing of summary court cases be changed to improve fairness, effectiveness, efficiency and speed?

- 7.33 The monitoring data indicate that after an initial impact on the early guilty plea rate following the legal aid and disclosure reforms, there has not been a continued improvement. Given the precise nature of the changes involved – the introduction of disclosable summaries was rolled out quite quickly and consistently across all courts and the change to legal aid payments was immediate – it might have been expected that the reforms would have had an immediate and fairly major impact, as participants in the system could quickly react to them, and not require an extended bedding in period. As the initial impact now appears to be tailing off, it is worth considering what further changes, either to legal aid or disclosure or to other aspects of the system, might facilitate further progress towards the SJR aims.

- 7.34 A number of the potential efficiency gains mentioned by interviewees related to online technology – the electronic processing of disclosure for example. It is important to ensure that online technology works efficiently and also that it does not have unintended consequences. For example, there was a perception that while the ‘cite all’ button on one of the PF screens used to process citations may save time initially for the PF by removing the need to judge the necessity of each witness in each case, this was leading to over citation (e.g. of police witnesses) in some cases. Also noted were the difficulties with disclosure by pen drive on the day of the ID. When this happens, it can require an adjournment to allow the defence solicitor to print the material out and review it before discussing with their client. This situation could be avoided by ensuring timely disclosure in all cases but, in those where it is not, disclosure on paper, rather than via pen drive, might be considered.
- 7.35 The speed of throughput can be as much a function of external matters, such as a need to obtain viewable and court compatible CCTV images and forensic results, as legal processes and procedures. Improving the system’s ability to cope with these would probably result in improvements to efficiency and speed.
- 7.36 The prospect of a sentence discount featured highly as a factor motivating early pleas but there was still a sense amongst interviewees that discounts were not consistently, or obviously, applied. Ensuring the consistent application of sentence discounts, or extending them as a reward for early pleas, might lead to a greater number of early pleas.
- 7.37 Witness non-attendance at TDs is still a key cause of adjournment and the likelihood of trial adjournment remains a significant factor in plea decisions by accused. There would be benefits, then, in maximising witness attendance so that accused are discouraged from taking a chance on an adjournment and offering a not guilty plea.
- 7.38 Although practitioners often saw the summary justice reform package as a potential catalyst and opportunity for better and more focused communication between agencies and professional interests, in some respects, the centralised systems designed to improve efficiency may have made this more difficult. The PF call centre and centralised witness citation system, for example, were mentioned in this context.
- 7.39 Indeed, the requirement for individuals and parties to work together to ensure the success of the reforms was acknowledged as a significant barrier to their achievement. This ‘human side’ of the system was seen as causing delays which would be difficult to resolve. The challenge of having so many parties involved – all with potentially different priorities – was also seen as a barrier to the system working effectively, even though it was suggested that working together was becoming more of a priority. There was also a view that this is a long term process and that, although the reforms have facilitated change, the complexities of the system on the ground mean that there is a continuing need to review local practices. There may be a greater role for the judiciary to promote and co-ordinate this local co-operation and efficiency. In one area, at least, the acknowledged pro-active and collegiate approach of the local bench

appears to have had a notable effect on the culture of other court practitioners and on case outcomes.

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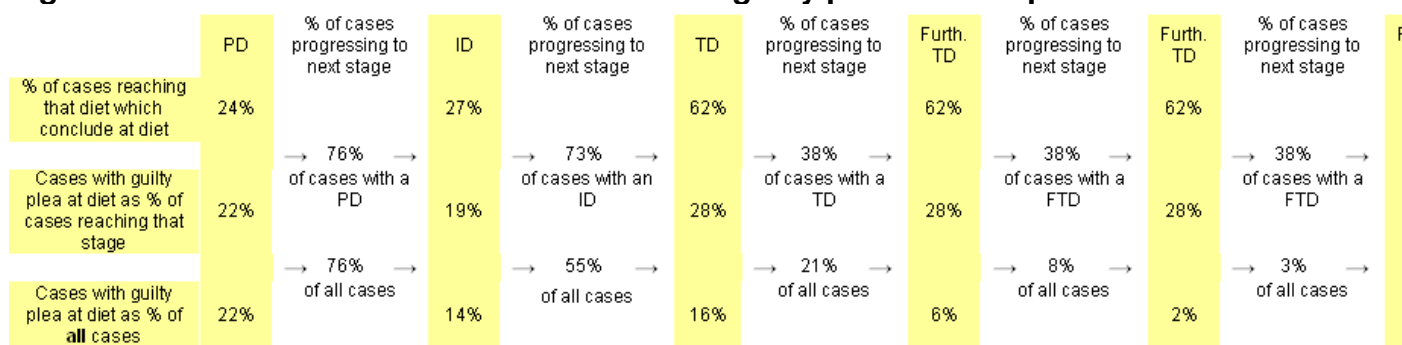
APPENDIX A – SUPPLEMENTARY FIGURES AND TABLES

Estimating the overall guilty plea rate

The data on guilty plea rates at each diet are based on a snapshot of the cases appearing at those diets in any single month. Thus the figure on the rate of guilty pleas offered at ID for July 2009 for example, is expressed as a proportion of all IDs in July 2009. As a result, these data refer to different groups of cases and it is therefore not possible to simply add up the guilty plea rates at each diet over a single month or any other time period. To obtain an overall guilty plea rate it would be necessary to follow a single group of cases from their PD through to their conclusion. Whilst this data has been provided for a sample of cases (see the section on analysis of disclosable summaries in Chapter 4), the numbers are not large enough to provide a robust estimate.

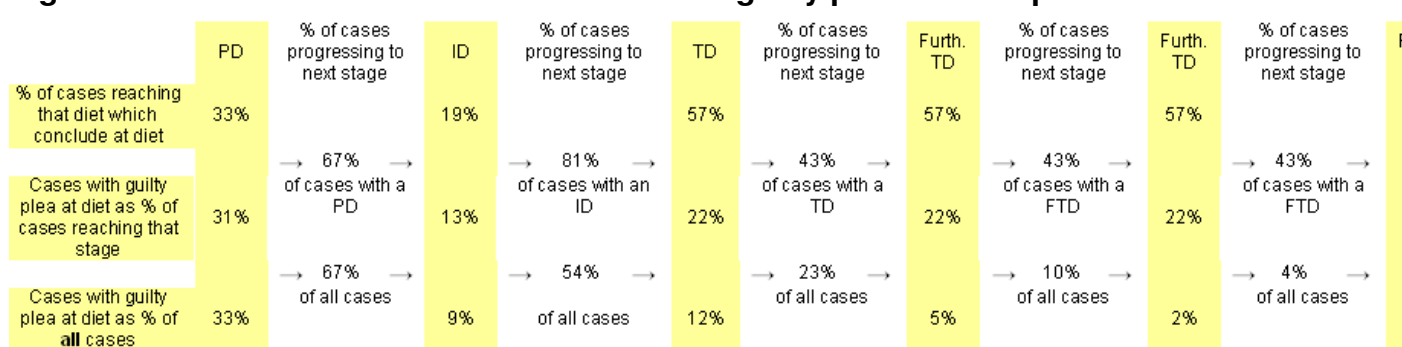
Thus the overall guilty plea rate was estimated using the figures on the proportion of cases concluded and the guilty plea rate at each diet. Figures A.1 and A.2 below detail the figures used for the pre-reform and post-reform calculations.

Figure A.1 Estimation of % of all cases with a guilty plea offered: pre-reform



The proportion of all cases with a guilty plea offered is calculated as: 22% + 14% + 16% + 6% + 2% + 1% = 61%.

Figure A.2 Estimation of % of all cases with a guilty plea offered: post-reform



The proportion of all cases with a guilty plea offered is calculated as: 33% + 9% + 12% + 5% + 2% + 1% = 62%.

Figure A.3 Types of offences registered for prosecution in the JP/district courts 2007/08 to 2010/11

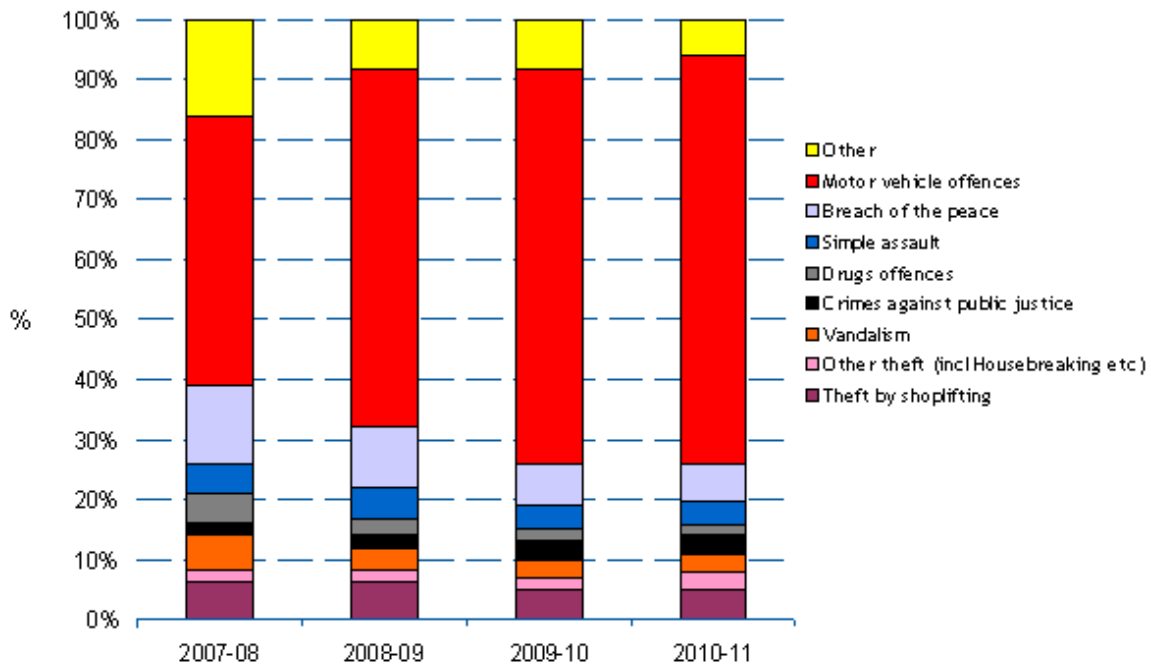
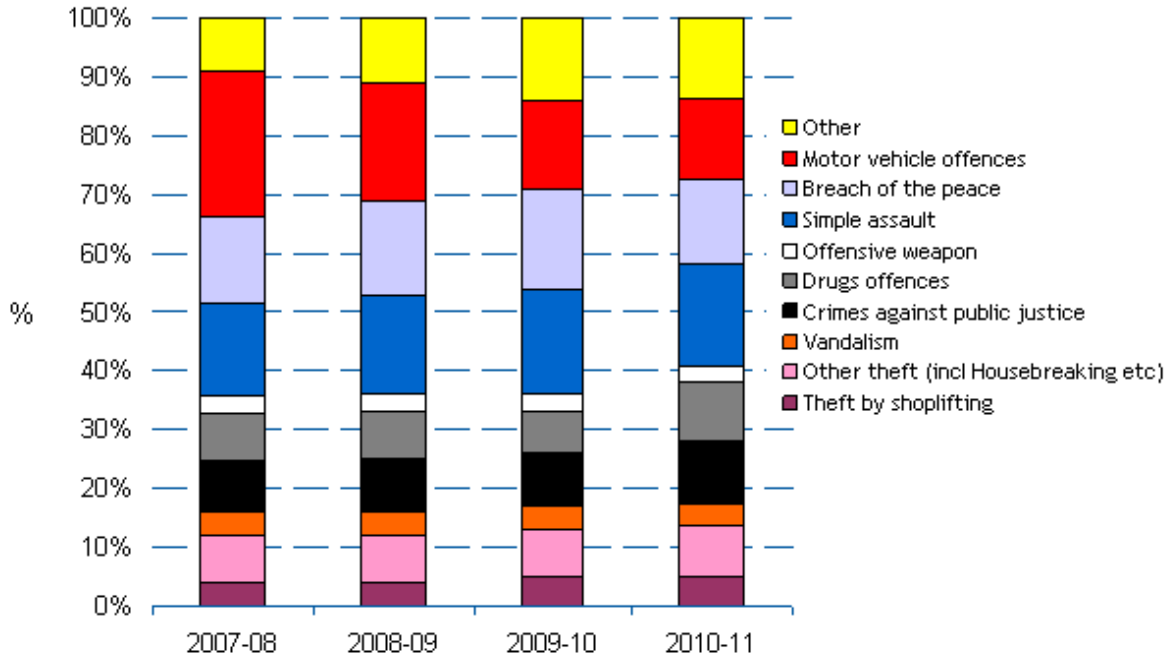


Figure A.4 Types of offences registered for prosecution in the Sheriff courts 2007/08 to 2010/11



APPENDIX B – ANALYSIS OF THE ECONOMIC IMPACT OF THE REFORMS

We have assessed the wider economic impact of the reforms using decision modelling. The main benefit of using this approach is that it enables complex processes and activities to be broken down into component parts, each of which can then be further broken down and analysed in detail before being recombined in a logical, quantitative and transparent way to estimate – in this case – the economic consequences of different courses of action and different experiences. The ultimate purpose is to identify which of the options provides better value for money. The structure of the model allows pathways through the system and possible outcomes (fines, custodial sentence, acquittal, further court attendances, etc.) to be mapped out. The probabilities of following the paths of the model are estimated from routine data where available and the costs associated with them from national figures. There is of course a level of uncertainty around these probabilities and costs. To address this uncertainty we have conducted sensitivity analyses where individual parameters are altered and the impact on expected costs observed. This approach has previously been used to evaluate electronic monitoring for people on bail, fines enforcement and also numerous healthcare interventions.

The model is shown in Figure B.1. Individuals enter the model at the left and either attend a PD or have the case abandoned before this stage. However, as will be seen from the table on probability values we assume that all the cases we are interested in have a PD. At the PD there is a probability of a guilty plea, a not guilty plea leading to an ID or the case being deserted. Continuations and adjournments, whilst not displayed in the model, have been adjusted for in the calculations as will be discussed below. If a plea of guilty is made then the court either imposes a fine, a prison sentence, a community sentence or there is another disposal such as admonishment or absolute discharge. Similar events can occur following an ID, TD and sentencing diet.

Data sources

In order to compare criminal justice system costs pre- and post-reform we have run the model using Sheriff court activity data from two time periods. For the pre-reform period we have, where possible, used data relating to the period from April 2006 to September 2007, whilst for the post-reform period we have used data for the period July 2008 to March 2011.²⁵ However, for some activity data (specifically on sentencing) we have had to use data for the first three-quarters of 2008 for the pre-reform period. Data on probabilities have largely been obtained from the Key Performance Indicators on the Criminal Justice Board Management Information (CJB MI) system and are shown in Table B.1.

Costs of court appearances have been obtained from data used in the Audit Scotland report “An Overview of Scotland’s Criminal Justice System” published in 2011. Costs of sentencing options have been obtained from “Costs and Equalities and the Scottish Criminal Justice System 2005/06” produced by the Scottish

²⁵ Almost no pre-reform activity data are available for JP courts, as such exclusively Sheriff court activity data has been used where possible. However, some data items did not permit a separation of Sheriff and JP court activity and represent average probabilities across both courts.

Government. The model takes into account the occurrence of adjournments by weighting the court costs. For example, in the pre-reform model the cost of a pleading diet is multiplied by 1.17 to reflect the 17% of cases where an adjournment takes place. It has been assumed (based on trial diet data from Audit Scotland) that an adjourned diet will incur one-fifth of the costs of a single diet. Costs for prison stays after an evidence-led trial assume a duration of six months. Adjustments have been made to allow for the potential of sentencing discounts for early pleas. The unit costs contained in this report have largely been taken from the recent Audit Scotland report. Others have been obtained from previous work and inflated to 2009/10 costs where necessary using inflators published by the Personal Social Services Research Unit. We have decided to use unit costs relating to one year rather than using unit costs relating to the pre- and post-reform periods because the key interest is to see how changes in activity levels affect costs rather than investigating how unit costs change over time. The costs used in the model are shown in Table B.2. With the exception of defence costs these were changed by 50% upwards/downwards in sensitivity analyses.

Basecase results

From Table B.1 it can be seen that the main differences between the pre- and post-reform models are that in the latter a higher proportion of individuals are assumed to plead guilty at pleading diet, fewer proceed to an intermediate diet, and sentences are more likely to be fines.

The model run using pre-reform data results in an expected cost per person going through the system of **£3047**. Using data for the post-reform period the expected cost per person is **£2642**. This suggests savings (for the events modelled) of **£405** per case (13%) on the pre-reform situation. It is likely that sentencing outcomes differ by type of diet but data were not available on this. This suggests that the cost savings may be underestimated. In 2009/10 83,276 went through the courts. Multiplying this number by £393 suggests cost savings of **£33.7 million**.

The above figures include the costs of sentencing and defence agents. If the sentencing costs are excluded then the costs per case pre-reform are **£1364** and post-reform are **£1366**. If defence costs are also excluded then the costs per case pre-reform are **£751** and post-reform are **£753**. The reduced likelihood of proceeding past the pleading diet post-reform is offset by an increased proportion of intermediate diet cases going on to a trial and a greater likelihood of adjournments post-reform compared to the pre-reform situation. These figures suggest an increase in court costs of **£0.17 million**.

Sensitivity analyses

In the post-reform model the costs were sensitive to changes in the probability of a guilty plea at pleading diet. If this was 0.1 then the expected costs would be £3035, for a probability 0.2 (i.e. the same as in the pre-reform model) the expected cost is £2864. If the probability were higher than assumed in the model then the cost would be lower than in the base case model, e.g. £2523 for a probability of 0.4 and £2352 for a probability of 0.5.

Figure B.2 shows that the cost saving of £405 was relatively robust to changes in the costs of legal system events upwards/downwards by 50%. Greatest uncertainty was

around and prison costs (C2). Changes in this could result from different assumptions about plea bargaining.

Legal aid expenditure

In 2007/8 the total expenditure on summary criminal legal assistance – that is on A&A, ABWOR and SCLA - for cases going through the Sheriff Courts was £58.2 million²⁶. In 2009/10 the equivalent figure was £47.2 million, a decrease of £11 million.

Main limitations to the analysis

To summarise, the main limitations of the economic analysis are as follows:

- For some indicators, the pre-reform activity data extends to April 2006, for others it is only available from early 2008 when, arguably, some effects of SJR were already being seen.
- Court and prosecution costs are estimated from data published in 2005/06 and adjusted to take account of inflation.
- Allowance has been made for only one adjournment of any single diet stage. Qualitative evidence suggests that some cases may have multiple adjournments/appearances at each stage. However, data on number of appearances at each diet is not available.
- The likelihood of receiving a particular disposal – fine, community sentence, custody – is assumed to be the same at each potential stage of conclusion.
- Likewise, costs for prison stays after an evidence-led trial assume a duration of six months. Adjustments have been made to allow for the potential of sentencing discounts for early pleas. Data are not available on average length of custodial sentence by type of diet.
- The trajectory data and corresponding court and prosecution costs have been calculated to allow a precise comparison of pre- (up to June 2008) and post-reform periods (from June 2008 to March 2011). However, data on legal aid expenditure is only available by financial year as such the pre- and post-reform periods for each set of data do not match exactly.

The sensitivity analysis described above was undertaken to explore the impact of a significant change to any of the assumptions made which are related to the key limitations listed here. This analysis indicated that the key estimated costs were relatively robust to any changes.

²⁶ This is calculated as the total amount paid in criminal legal aid related to Sheriff court cases plus 86.5% of the total amount paid in relation to ABWOR and A&A (the remaining 13.5% for these aid types being paid in relation to District/JP court cases).

- Figure B.1 Decision model of summary criminal justice system.

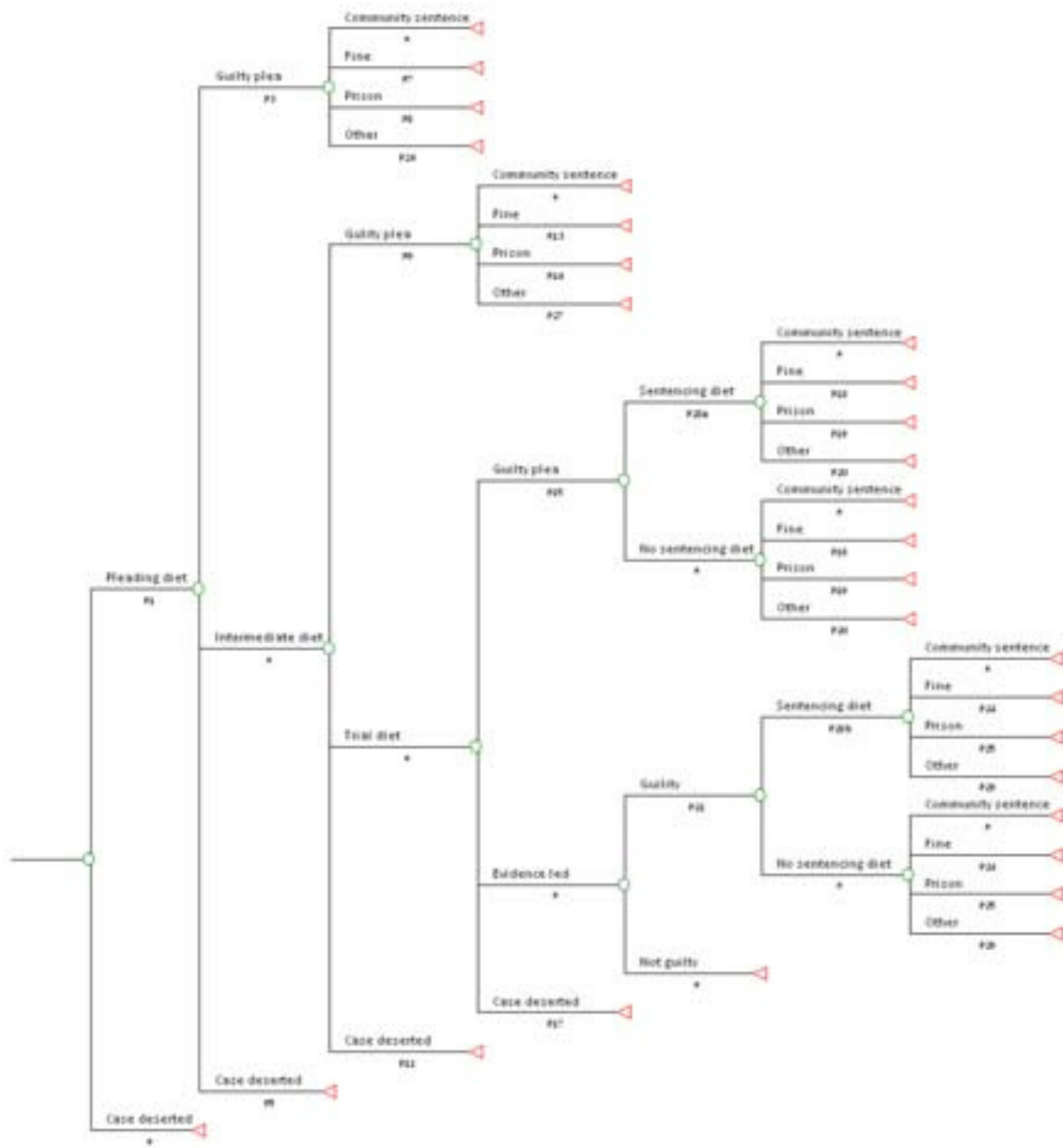


Figure B.2 Sensitivity analyses around cost estimates.

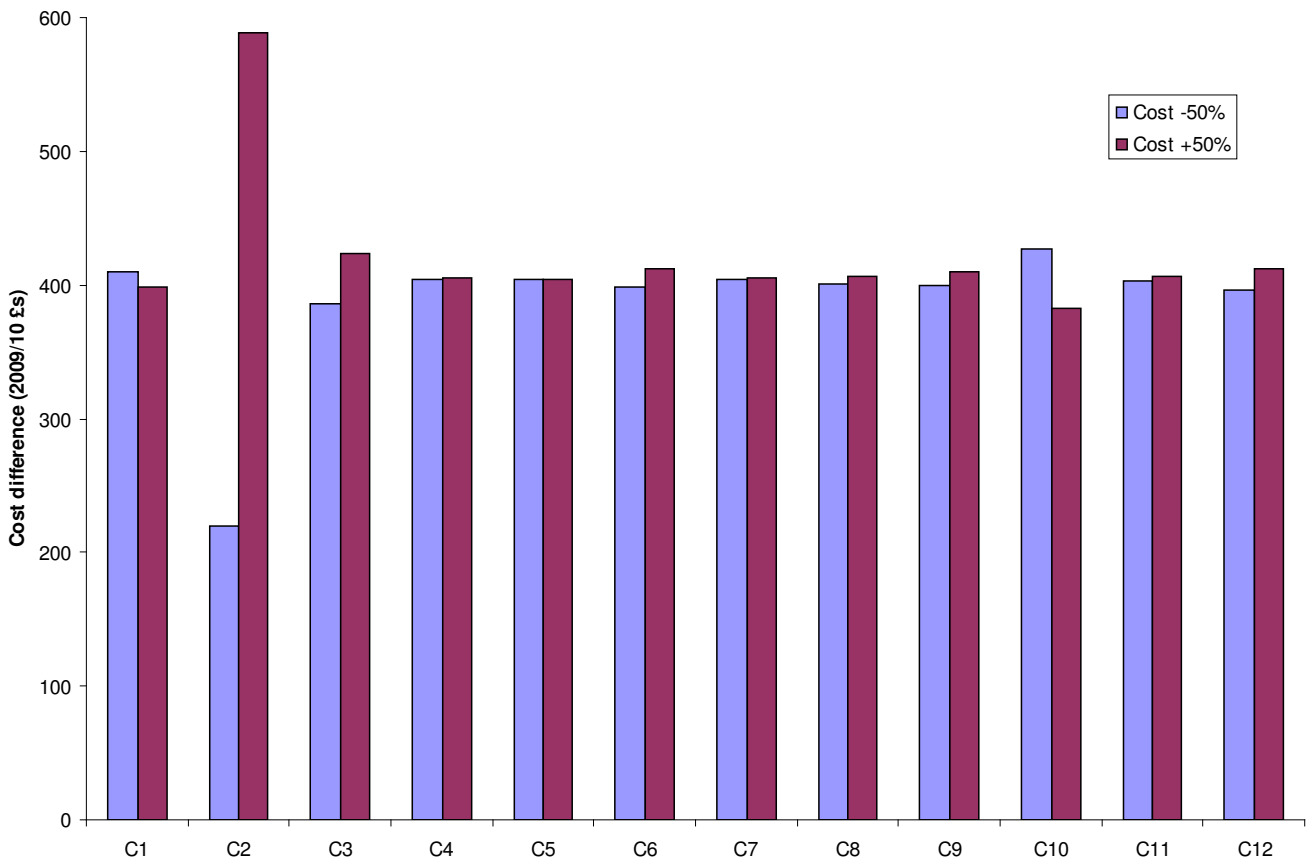


Table B.1 Probabilities used in model.

Prob	Description	Pre	Post	Source
P1	Attending pleading diet	1.00	1.00	Assume the model relates just to those with an initial pleading diet
	No pleading diet	0.00	0.00	Default probability
P3	Guilty plea at pleading diet	0.22	0.33	KPI25
	Proceed to intermediate diet	0.78	0.64	Default probability
P5	Case deserted	0.06	0.04	KPI25, figures for not guilty plea accepted and case not called/deserted
	Community sentence	0.37	0.32	Default probability
P7	Fine	0.47	0.56	KPI32, average of 2008 (pre) and 2010 (post) figures
P8	Prison	0.16	0.12	KPI32, average of 2008 (pre) and 2010 (post) figures
P26	Other outcome	0.22	0.21	KPI32, average of 2008 (pre) and 2010 (post) figures
P9	Guilty plea at intermediate diet	0.19	0.14	KPI27
	Proceed to trial diet	0.73	0.82	Default probability
P11	Case deserted	0.08	0.06	KPI27, figures for not guilty plea accepted and case not called/deserted
	Community sentence	0.37	0.32	Default probability
P13	Fine	0.47	0.56	KPI32, average of 2008 (pre) and 2010 (post) figures
P14	Prison	0.16	0.12	KPI32, average of 2008 (pre) and 2010 (post) figures
P27	Other outcome	0.22	0.21	KPI32, average of 2008 (pre) and 2010 (post) figures
P15	Guilty plea at trial diet	0.28	0.23	KPI29
	Evidence led	0.54	0.61	Default probability
P17	Case deserted	0.18	0.16	KPI29, figures for not guilty plea accepted and case not called/deserted
P28a	Sentencing diet following guilty plea	0.61	0.53	KPI29, figures for guilty plea, no evidence led, adjourned to sentence
	No sentencing diet	0.39	0.47	Default probability
	Community sentence	0.37	0.32	Default probability
P18	Fine	0.47	0.56	KPI32, average of 2008 (pre) and 2010 (post) figures
P19	Prison	0.16	0.12	KPI32, average of 2008 (pre) and 2010 (post) figures
P20	Other outcome	0.22	0.21	KPI32, average of 2008 (pre) and 2010 (post) figures
P21	Guilty following trial	0.89	0.89	Criminal Proceedings in Scottish Courts
	Not guilty following trial	0.11	0.11	Default probability
P28b	Sentencing diet following trial	0.19	0.16	KPI29, figures for evidence led, adjourned to sentence
	Community sentence	0.37	0.32	Default probability
P24	Fine	0.47	0.56	KPI32, average of 2008 (pre) and 2010 (post) figures
P25	Prison	0.16	0.12	KPI32, average of 2008 (pre) and 2010 (post) figures
P29	Other outcome	0.22	0.21	KPI32, average of 2008 (pre) and 2010 (post) figures
Adj_PD	Adjournment of pleading diet	0.17	0.27	KPI25, figures for continued without plea and warrant to apprehend issued
Adj_ID	Adjournment of intermediate diet	0.42	0.47	KPI27, figures for, warrant to apprehend issued, continued to further intermediate diet and continued to new trial diet
Adj_TD	Adjournment of trial diet	0.38	0.42	KPI29, figures for no evidence led adjourned to further trial diet, adjourned on Crown motion – witness not cited/absent, warrant to apprehend issued

Note: Default probabilities are 1 minus the other probabilities at that point. Unless otherwise stated, pre-reform figures refer to the average rate over the period April 2006 to September 2007. Post-reform figures refer to the average rate over the period July 2008 to March 2011.

Table B.2 Unit costs used in model.

Cost	Value (£)	Description	Source
C0	613	Defence costs	Audit Scotland (personal communication)
C1	96	Pleading diet, guilty plea	Audit Scotland (personal communication)
C2	18333	Prison	2004/5 cost of 6 months in prison
C3	1504	Community sentence	2004/5 cost of probation order, community service order, supervised attendance order
C4	19	Pleading diet, move on	Audit Scotland (personal communication)
C5	19	Pleading diet, deserted	Audit Scotland (personal communication)
C6	272	Intermediate diet, guilty plea	Audit Scotland (personal communication)
C7	54	Intermediate diet, move on	Audit Scotland (personal communication)
C8	272	Intermediate diet, deserted	Audit Scotland (personal communication)
C9	318	Trial diet, guilty plea	Audit Scotland (personal communication)
C10	1566	Trial diet, evidence led	Audit Scotland (personal communication)
C11	318	Trial diet, deserted	Audit Scotland (personal communication)
C12	471	Sentencing diet	Audit Scotland (personal communication)

APPENDIX C – RESEARCH METHODS

Summary of research design

This study used quantitative and qualitative methods to explore the practice and operation of the summary justice system and participants within it pre- and post-reform of SCLA and disclosure, perceptions of the reforms amongst key participants involved in the summary justice system, the impact of the reforms on case trajectories, timescales and outcomes, and the financial impact of the reforms.

Our approach sought to explore, in detail, the impact on the reforms on the behaviour and practice of key criminal justice personnel, identify facilitators and barriers to the reforms achieving their objectives and assess the contribution of the reforms to the overall aims of SJR.

The design was based on a number of, separate, but linked, research elements, and involved the collection of primary qualitative data from depth and semi-structured face to face and telephone interviews, alongside detailed analysis of existing aggregate national performance/monitoring data and economic data and individual case-level data. The principal elements involved:

- Qualitative exploration with key stakeholders of the perceived objectives, operation and outcomes of reforms to SCLA, disclosure and SJR as a whole;
- Quantitative analysis of the ‘impact’ of the reforms on case timings, trajectories and outcomes at both a national and, where possible, individual court level;
- Qualitative examination of the local operation and impact of SCLA and disclosure in four Sheriff courts;
- Analysis of the content and quality of a sample of 200 disclosable summaries and consideration of data on their subsequent case trajectories and stage of conclusion;
- Quantitative analysis of data recorded in selected courts on the reasons for continuation of IDs;
- Depth face-to-face interviews with accused persons, where possible with experience of the summary system before and after the reforms;
- Exploration of ‘national level’ views on the reforms amongst defence solicitors – via a postal survey and follow-up telephone interviews – and amongst Depute Procurators Fiscal via telephone interviews;
- Analysis of case trajectory and cost data to identify typical court, prosecution, sentencing and legal aid costs associated with processing Sheriff court cases before and after reforms.

Stakeholder interviews

Scoping interviews with key players in the initiation of the reforms were conducted to examine perceptions of the original problem which the reforms would address and perspectives on what the reforms hoped to achieve as well as exploring

understandings of 'fairness' and 'effectiveness' in relation to the broader SJR aims. Interviewees from COPFS, SLAB and ACPOS were also asked about the monitoring data collected by these agencies. Eight interviews were undertaken in total involving 10 individuals, drawn from the stakeholder agencies/organisations listed below.

- COPFS
- ACPOS
- An experienced Sheriff
- SLAB (A small group discussion was held with three senior SLAB officials)
- Law Society (2 representatives of the Law Society were interviewed)
- Bar Association (representatives of 2 Bar Associations were interviewed)

Analysis of quantitative monitoring and case trajectory data

Analysis was undertaken of SJR monitoring and Key Performance Indicator (KPI) data to compare over time the differences in the outcome of PDs, IDs and TDs, differences in the stage of conclusion of summary cases by court, and agency performance against target timescales set out in the Summary Justice Model Paper. The data was also used to explore broader changes in the nature and distribution of summary business and to examine changes in applications for and grants of criminal legal aid.

The majority of data in the KPIs relevant to the analysis of SCLA and disclosure is available as monthly counts from April 2006. Data was extracted corresponding to the period April 2006 to March 2011. To consider the impact of the changes to SCLA and disclosure on case trajectories and outcomes, a series of average monthly plea rates were calculated for each of the KPIs used. The rates indicate the proportion of each diet held in each month which resulted in a particular outcome – e.g. guilty plea offered, adjourned. These average rates correspond to the following periods:

- The period prior to the introduction of the disclosure reforms (April 2006 to September 2007);
- The period between the introduction of the disclosure reforms and the introduction of the legal aid reforms (October 2007 to June 2008).
- The first year after the legal aid reforms were introduced (July 2008 to June 2009)
- The second year after the legal aid reforms were introduced (July 2009 to June 2010)
- The first three quarters of the third year after the legal aid reforms were introduced (July 2010 to March 2011).

The data was arranged in this manner in order to tentatively examine: first, the impact of changes to disclosure; second, the combined impact of subsequent changes to legal aid; and third, whether any change which appears to have resulted from the reforms has been sustained and whether outcomes and trajectories have stayed the same post-reform or continued to change.

Where possible, local variations in these data were explored at individual Sheriff court level for the four Sheriff courts selected for the qualitative case study. However, not all indicators of interest were available at individual court level.

As data was not available from JP/District courts prior to unification, it is not possible to compare pre- and post-reform rates on these indicators.

- In-depth face-to-face interviews with a representative of each agency sitting on the SCLA Monitoring and Evaluation Group.
- Analysis to identify any changes in case timings, trajectories and outcomes since the two-stage onset of the reforms, and differences in the magnitude of any observed changes between courts. This early analysis was used to select the four courts necessary for the second stage of the research.

Qualitative examination of the local operation and impact of SCLA and disclosure reforms in four courts

This stage of the research involved observation of court proceedings along with qualitative, in-depth interviews with key justice personnel in four Sheriff courts. A range of monitoring data was extracted and analysed to influence the selection of the four courts. Selection criteria for the courts, including the justification for considering each criterion, are detailed in Table A.1 below.

Table A.1 Criteria for selection of Sheriff courts for case study

Criteria	Detail	Reasons for inclusion
Volume and mix of court business	- Number of total and different types court diets	- The total number of cases heard, and the nature of those cases all potentially impact on the ability of agencies involved to prepare and respond as required.
Change in guilty plea rate at pleading diet	- % of pleading diets where guilty plea is offered	- An increase in Guilty plea rate suggests both an impact of reforms to SCLA through the new case disposal fee, and an impact of disclosure reforms where disclosable summaries allow defence solicitors to have more informed discussions with PFs and clients about the most suitable plea to be entered. A greater increase, and one which has been sustained, may suggest greater impact of the reforms.
Continuations and other outcomes at intermediate diet	- % of intermediate diets which are continued - % of intermediate diets	- A key objective of the reforms to disclosure is to permit more 'effective' intermediate diets. Effective

	with other outcomes ²⁷	intermediate diets may be considered to be those which are 'terminal' – allowing the trial diet to be cancelled – or which do not affect the existing date for the trial diet. Previous research (Leverick and Duff, 2001; Stephen and Tata, 2006) also indicates that one of the main reasons for intermediate diets being continued is that the defence is still waiting on statements from the Crown. Thus, an increase in 'terminal' outcomes at intermediate diet, and a decrease in continuations may suggest greater impact of the reforms on practice and procedure.
Average number of diets per case		- Each of the reforms seeks to create a more efficient and effective summary justice system. A reduction in the average number of diets suggests more effective diets, and a more efficient system.
Change in volume of legal aid grant applications	<ul style="list-style-type: none"> - Number of grants of Criminal Advice and Assistance - Number of grants of ABWOR - Number of grants of SCLA 	- A knock-on effect of any increase in guilty plea rates at pleading diet will be a subsequent decrease in applications for summary criminal legal aid. Examination of changes in the volume and types of legal aid applications made will give some indication of the success of the reforms against key objectives.
Geographic composition of Sheriffdom/location of court	<ul style="list-style-type: none"> - Sheriffdoms which cover areas which are predominantly urban or rural - Courts located in urban or rural areas 	- To allow exploration of variations in operation of reforms which may result from particular geographic issues, for example related to rurality – e.g. access, payment methods.

Relevant data to explore each of these criteria were downloaded from the CJBMI system or provided by the SCS. These data were then analysed and the relevant courts selected. To protect the identities of interviewees, the names of all courts have been anonymised.

Volume and mix of court business

Data on the number of PDs, IDs and TDs heard in each of the 49 Sheriff courts in each month from April 2007 to December 2009 was considered. This data was believed to provide a suitable measure of court throughput. Monthly data for the whole period was combined and a figure calculated indicating the average number of diets heard in each court per month. This figure ranged from 10 to 3625. To filter out courts with very low throughput – which were considered too small to be included in the research – only courts with more than 150 diets per month were considered for selection. After this filter was applied, 25 courts remained available for selection.

²⁷ Note: at the time of writing, the only outcome available at intermediate diet for which data was available at court level was guilty plea rate.

Change in guilty plea rate at pleading diet

KPI25 on the CJBMI system records, for each month and in each Sheriff court, the proportion of accused who pled guilty at PD. To consider change in guilty plea rate, two average monthly guilty plea rates were calculated: one referring to the period prior to the introduction of the SCLA reforms (April 2006 to June 2008); the other referring to the period after the introduction of the reforms (July 2008 to December 2009). Amongst the busier courts included in the analysis, the pre-reform rate ranged from 10% to 43%. Notably, the courts for whom the average pre-reform guilty plea rate was lowest were the largest and busiest courts. The post-reform rate ranged from 23% to 50%.

These data were used, amongst those courts with more than 150 diets per month, to differentiate between two different groups:

- Courts with a relatively *high* proportion of guilty plea rates at PD in the *pre*-reform period.
- Courts with a relatively *low* proportion of guilty plea rates at PD in the *pre*-reform period.

The 25 busier courts were split into four equal groups (quartiles) according to their average pre-reform monthly guilty plea rate. Any court with a pre-reform guilty plea rate in the top quartile of busier courts was considered to be in the high group (equal to a pre-reform guilty plea rate of 25% or higher). Any court with a pre-reform rate in the bottom quartile was considered to be in the low group (equal to a pre-reform rate of less than 18%). Six courts fell into the high group and five fell into the low group.

To examine the change in guilty plea rate, the difference between the pre-reform rate and the post-reform rate was calculated in percentage points illustrating the 'impact' of the reforms. This difference ranged from 5 to 17 points. However, for comparative purposes, the relative 'rate' of change was then also calculated. This figure indicates the relative increase in average guilty plea rates between the pre- and post-reform periods. It permits an exploration, among courts which saw a similar change in rates as measured by percentage points, of the magnitude of that change relative to the pre-reform rate. For example, say guilty plea rates in Court X and Court Y both increased by 11 points. Because Court X started from a lower pre-reform rate of 16, compared with 26 in Court Y, the rate of change is thus higher for Court X at 1.6 compared with 1.4 in Court Y. This data on the rate of change was used to further differentiate courts in the high and low groups identifying courts in each group where there was a high increase in guilty plea rate at PD or a low increase relative to the pre-reform rate following the introduction of the legal aid reforms.

Our aim was to select, from each group, one court displaying a low rate of change and one court displaying a high rate of change. Furthermore, the selected courts were required to reflect variations in volume of business and geographic areas. The courts selected had the following characteristics:

- Court A: This is the largest Sheriff court selected and has the lowest % guilty plea at PD, but high increase in plea rate. Court A represents a very large urban area.

- Court B. This is a medium-sized court with a relatively low % guilty plea at PD pre-reform and low impact. Court B represents a medium-sized urban area located within predominantly rural surroundings.
- Court C: This is a larger court with a relatively high % guilty plea at PD pre-reform, and high impact. Court C represents a large urban area.
- Court D: This is a smaller court with a relatively high % guilty plea at PD pre-reform, but low reform impact. Court D represents a relatively rural area.

Data illustrating the remaining criteria for selection were then considered in order to compare other areas of potential impact. Overall, the selected courts are believed to represent a reasonable variation of reform impact according to these additional criteria. Furthermore, several of the proposed courts were being included in the various local court recording exercises which are discussed below. This would potentially generate detailed data on reasons for continuation in these courts.

Observation of court proceedings were undertaken for each case study court. In addition, for each of the 4 courts at least 7 face-to-face interviews were conducted with key personnel some of whom had been involved in the observed cases: Sheriffs/JPs (2), Depute PFs (2), defence lawyers (2) and court clerks (1). Face-to-face interviews with 2 senior police officers in each case study area were also conducted. These interviews were conducted between July and September 2010 and covered how the reforms were impacting on the practice of key criminal justice personnel and their perceived effect on case trajectories and outcomes.

Interviews with persons accused

In-depth face-to-face interviews were conducted with 16 persons accused (4 in each case study area) between October and November 2010. The sample was recruited via a variety of sources including defence lawyers, social workers and the police. Four interviews took place in the respondents' homes with the remainder conducted within agency offices (e.g. Arrest Referral Scheme offices, NHS Substance Misuse agency offices) or whilst the respondent was in custody. All respondents had experience of the Sheriff court process pre- and post-reform. Interviews covered views and experiences of court appearances before and after the reforms were introduced as well as perceptions of fairness and views on the actions of their lawyers.

Analysis of disclosable summaries

An analysis of 192 anonymised disclosable summaries supplied by COPFS was carried out in October and November of 2010. The sample comprised 50 disclosable summaries from each of three summary Sheriff courts which were investigated in detail and 42 from the remaining court (reflecting the number supplied rather than the number requested). The sample was selected at random simply by taking the first 50 relevant²⁸ cases in each court from 1st July 2009. This date was selected on the basis that it was sufficiently distanced from the introduction of the reforms to allow for any initial teething problems to have been addressed and for the new processes to have 'bedded in'. It was also far enough in the past from the current date so that the majority of cases would have reached a conclusion thus allowing

²⁸ For example, it was agreed to exclude cases being heard in any 'specialist' courts.

consideration of that conclusion in the additional trajectory data received on the cases.

For each of the selected cases, the disclosable summary was printed and supplied to the research team. The names of the accused, witnesses and any other identifying details, such as addresses, were redacted from the summaries by COPFS before the disclosable summaries were handed over to the research team.

The disclosable summaries were assessed against a number of criteria, based on the ACPOS guidance contained in the ACPOS Disclosure Manual. Summaries were thus scored according to a 5 point scale - a '5' indicating that the information provided was entirely satisfactory. The ACPOS guidance explains that the COPFS 'summary of evidence' should be drawn from the following sub-sections of the police report: description of locus; description of events; police interview/text of admission; caution and charge/reply; and medical evidence. In addition to assessing the disclosable summaries against these criteria, an overall rating was given to each one and various other data was recorded about the nature of the case. These included: the broad type of crime involved; whether the accused was remanded in custody until the next court; and the PF case number. The ratings and other data were recorded in an Excel spreadsheet.

A number of defence solicitors were recruited in order to test the validity of the research team's ratings. These were each given a sample of ten disclosable summaries and asked to give them an overall rating on the same 5 point scale already used. Each solicitor was given some satisfactory and some less than satisfactory summaries. When, in their judgement, there was insufficient information in the disclosable summary, they were asked to indicate briefly what was missing that they would have found helpful in advising the accused if he/she were their client. As a result of the low number of summaries rated as less than entirely satisfactory (see below), it was possible to include the great majority of these in the summaries given to defence solicitors.

Methodological points

An important methodological issue arose very early on in relation to this exercise. Essentially, the task was to determine how satisfactory the disclosable summaries were in supplying sufficient information to the accused and, more important, his/her solicitor to be able to decide upon a plea at the earliest possible stage. The question was - what standard should disclosable summaries be measured against: an 'ideal' standard; or a 'realistic' one? This dilemma can be illustrated simply. The disclosable summary will not contain information about the laboratory analysis of suspected drugs found on the accused. In an ideal world, such information might be vital in determining whether the accused should plead guilty or not guilty. If the accused informs his solicitor that the material found in his possession was not prohibited drugs, then the solicitor will be bound to advise the client to plead not guilty; obviously, if the laboratory analysis reveals that the substance was prohibited drugs, there is likely to be a late change of plea. In practice, however, at the time when the disclosable summary is generated from the police report, a laboratory analysis of the suspected drugs will not have been carried out, nor can it reasonably be expected that it will have been done. Very often, the disclosable summary will have to be given to the accused, and thus his solicitor, the morning after he has

been arrested for his appearance from custody in court. In many other cases the period immediately before the scheduled court hearing may be the first opportunity the solicitor and client have had to discuss the case.

This gives rise to a related point, namely that the disclosable summaries were evaluated on what one might call a *prima facie* basis, i.e. in the abstract, as it were, without knowing what the accused might tell his defence solicitor. For instance, continuing with the illustration above, it is very unusual for the accused to claim that the 'drugs' in his possession are not in fact prescribed drugs and one cannot expect the police to anticipate every possible defence in the disclosable summary. Similarly, it is always possible that a 'drunk' driver will instruct his solicitor that he suffers from diabetes or some other medical condition which explains the apparent level of alcohol in his blood or urine. This can only be proved or disproved by a battery of medical tests and one cannot reasonably expect these to be done prior to the preparation of the disclosable summary, particularly if the accused does not reveal this defence until he consults his solicitor. In short, it is simply not possible that the disclosable summary can or could provide *all* the information that the defence solicitor might need; this cannot always be foretold in advance. Thus, in evaluating disclosable summaries, the standard used was the 'realistic' one: does the summary of evidence include on a *prima facie* basis all the information that the accused/defence solicitor could reasonably expect to have been included, given the time constraints and the possibility of the accused coming up with an unusual or unsustainable line of defence. This was judged to be a more informative approach than rating summaries against an 'ideal' standard which in practice could never be met in all cases.

In brief, therefore, the research team assessed how satisfactory the disclosable summaries were in terms of the information they might reasonably have been expected to include. Similarly, the defence solicitors who carried out the review of a small number of disclosable summaries were asked to assess them against the same standard.

Analysis of the case trajectories for the disclosable summary sample

To permit a consideration of the potential impact that the quality and content of a summary of evidence may have on case outcomes and stage of conclusion, the research requested case trajectory and outcome data on each case for which a disclosable summary had been provided.

The data supplied by COPFS provided a summary of the date, nature – e.g. PD, ID – and outcome – e.g. plea given, whether the appearance was 'final' – of each individual court appearance related to the disclosable summary cases. Using this data, the research team were able to calculate the stage at which each case was concluded – i.e. PD, ID or TD – and the number of times the case had called in court.

A single disclosable summary may refer to multiple accused. The case trajectory data, on the other hand, concerns only a single accused person. Thus the number of cases on which trajectory information was supplied was greater than the number of disclosable summaries considered (214 individuals from 192 summaries).

Analysis of reasons for the continuation of intermediate diets

Centralised management information is not available on reasons for continuation but we were fortunate that a number of reasonably large-scale local recording exercises were planned or already underway in many of the larger Sheriff courts. Whilst these exercises were focussed on local implementation and were being led by local SJR co-ordinators, they were to produce information useful to the evaluation, not least because they involved obtaining data from some of our proposed case study courts. Thus, whilst not a component of the evaluation research, the exercises would potentially produce data useful to triangulate findings from other elements of the research. The exercises were recording information for a large number of cases detailing the outcome of the case at ID along with the reason for that outcome. The range of outcomes, for example, include:

- Case moves forward to next stage
- Continuations
- Disposal
- Warrant
- Adjournment for enquiry

Where the outcome was categorised as ‘continuations’, the reason for the continuation was also to be recorded. Data was to be recorded on an electronic proforma by local practitioners who were attending ID courts. For the most part, the proforma being used was to be standard across all of the courts.

The research team received data of this nature referring to eight Sheriff courts and the outcomes of around 2000 cases at ID. However, in practice and due to local issues, the various recording exercises did not follow a standard procedure in each of the courts from which data were obtained. For some courts, the recording exercise was already underway when the proforma described above was being specified meaning the content of the data is slightly different. Of the eight courts from which data have been obtained, four applied the standard proforma described above. For some courts the raw data was supplied, in others a written summary of analysis of the data was provided.

Ultimately, it was possible to consider the outcomes of around 500 IDs across 4 Sheriff courts. To permit this, detailed reasons in the proformas were grouped under 6 broad headings. These headings, and the more detailed reasons which they incorporate, are detailed in Table A.2. All data was recorded during May and June 2010.

Table A.2 Grouped reasons for continuation of IDs

<p>Attendance of accused/co-accused: Accused ill Accused not available Accused not brought from custody Accused now present Co-accused failed to appear Personal appearance of accused</p>	<p>Attendance of witness/witness citation: Civilian witness unavailable Crown witness not available Police (or police witness) unavailable Check witness citation position Check/ cite PF Witness</p>
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Failure to appear	Check/ cite DEF Witness Essential defence witness absent
Further investigation/lack of preparation: Ascertain position on other matters Further enquiries To obtain further evidence Not prepared for trial Further prep Investigate/ enquire For clarification	Legal aid/representation/change of agency: For accused to obtain legal advice / assistance Legal aid issues Change of agency No Legal Aid Lack of instructions Solicitor unavailable
Disclosure: Defence medical report not available Lack of disclosure - statements Lack of disclosure - other Lack of disclosure - video / CCTV	Other: For resolution New evidence identified To call with other cases To await the outcome of other cases Other reason Child/ Vulner Witness Interpreter Other matters calling Poss Resolution Lack of court time

National perspectives on SCLA and disclosure reform amongst defence lawyers and Procurators Fiscal

A postal survey of defence solicitors was conducted in March 2011 to collect their views on how the summary justice reforms to legal aid and disclosure have impacted on their practice and more broadly, whether there has been any perceived impact in terms of efficiency, effectiveness and fairness of the summary justice system as a whole.

A list of defence solicitors who had applied for summary criminal legal aid work between April 2009 and September 2010 was obtained from the Scottish Legal Aid Board. A sample of 700 solicitors from the 1019 on the list was randomly selected. The sample was selected to reflect the spread of cases in different sizes of court, so was therefore stratified by the size of court the solicitors worked in. A judgement was made about the definition of large, medium and small courts such that large courts dealt with 700 or more cases per month, medium courts between 300 and 699 cases per month and smaller courts less than 300 cases per month.

Monitoring data from COPFS was used to ascertain the split of cases across large, medium and small Sheriff courts across Scotland in a month. Based on this definition, the monitoring data indicated that of the 18,237 court cases that took place in Sheriff courts across Scotland in one month, 53% were dealt with in the largest courts, 31% in medium sized courts, and 15% in smaller courts. Each solicitor on the

mailing list was allocated a court based on the nearest Sheriff court to their office, and subsequently, a court size (large, medium or small). The research team were therefore able to select the sample to reflect the spread of cases in different sizes of court (53% of the sample worked in large courts, 31% in medium courts and 15% in smaller courts). All 16 PDSO solicitors in the list from SLAB were selected, to ensure that views of PDSOs were invited.

An advance letter explaining the study and a paper questionnaire were sent to the 700 solicitors in the sample. After two reminders, 202 completed questionnaires were returned, giving a response rate of 29%.

Responses to the postal questionnaire were input into and analysed using SPSS statistical software.

Further in-depth telephone interviews were carried out with a sub-sample of 17 defence lawyers who responded to the postal survey to allow a more in-depth exploration of the key issues raised by the postal survey and of some of the more qualitative questions raised around plea advice and negotiation.

In addition, in-depth telephone interviews were conducted with 10 Depute PFs who were not consulted as part of the case study fieldwork, to obtain their views on how the reforms have impacted on their practice, as well as perceptions of any impact on efficiency, effectiveness and fairness of the summary justice system.

Identification of the economic impact of SCLA and disclosure reforms

A full description of the economic analysis undertaken is included in Appendix B

APPENDIX D - OVERVIEW OF SJR CHANGES TO SUMMARY CRIMINAL LEGAL ASSISTANCE

Summary criminal legal assistance provides legal advice, assistance and representation to people who would otherwise not be able to afford it in connection with a criminal matter, whether or not they have been charged with an offence. It is provided by a combination of four types of legal aid: advice and assistance, assistance by way of representation (ABWOR), the duty scheme (automatic legal aid) and summary criminal legal aid.

The basic fee structure and the main features of the changes to summary criminal legal assistance introduced by the SJR reforms are detailed below. These have been reproduced from the SLAB document *Summary Criminal Legal Assistance Reforms: Your guide to the changes, 9th June 2008*, available at:

http://www.slab.org.uk/common/documents/profession/summarycriminal/2008_mailings/mailling2_forms_order_for_web.pdf

	Sheriff/Stipendiary Magistrate's Court		JP court legal aid	JP court ABWOR
	Legal aid case disposal fee/core fixed payment	ABWOR case disposal fee		
Fixed payments	£515	£515	£315	£150

Advice and assistance

- Criminal advice and assistance fee rates increased by 10%.
- Where advice and assistance is granted, this will be subsumed within any subsequent grant of ABWOR or summary criminal legal aid except the cost of an exceptional police station visit.
- Two levels of initial authorised expenditure, one for general advice, pre-complaint, at £35; the other for standard advice in connection with a complaint or advice relating to a direct measure which is to be challenged, at £90.
- Abolition of the £25 minimum fee.

Assistance by way of Representation (ABWOR)

- The grant of ABWOR may be transferred as with summary criminal legal aid
- ABWOR will be available for a client's own appointed solicitor in custody and undertaking cases
- ABWOR will be available for continuations without plea
- Consolidation of the existing merits criteria for ABWOR
- Introduction of templated increases in authorised expenditure
- Increased fixed payments

Sheriff and Stipendiary Magistrate's court cases

- Introduction of a new "case disposal fee" for cases for which ABWOR or summary criminal legal aid has been granted in the Sheriff and Stipendiary Magistrate's court at £515, covering:

- All work carried out under advice and assistance except a police station visit which can be shown to be exceptional, in which case a separate payment will be made on a detailed fee basis;
- All continuations without plea;
- All work up to and including the first 30 minutes of the trial (where a trial commenced); and
- A first or second deferred sentence
- The case disposal fee does not include the following for which additional payments will be made to cover:
 - Third and subsequent deferred sentences at £50 each;
 - Additional payment for hearings where a social enquiry report is considered by the court during one of the first two deferred sentences, at £25 (payable once per case);
 - An exceptional police custody visit, on a detailed fee basis, where the travel to and time spent including waiting and attendance at the station exceeds two hours and that it can be shown that there was a need for the work to be done by the nominated solicitor as opposed to a correspondent local to the station.
- Where the case proceeds to the first day of trial, the current “core fixed payment” will remain, but paid at £515. The core fixed payment will now subsume work done under advice and assistance (excluding an exceptional police station visit) and also ABWOR.
- All non-core “add on” payments (trial days, notional diets, victim statement proofs etc), together with enhanced fees (under-21 in custody, rural court supplements) will continue to be paid as at present (at current blocks of £50, £100, £200 and £400).
- ABWOR will continue to be granted by the solicitor. However, where a solicitor has incorrectly or inappropriately applied either the ABWOR means test or merits test, the account may not be paid from the Fund.

JP court cases

- The split fee arrangements between ABWOR and summary criminal legal aid for JP courts will be maintained, with the fees set for ABWOR at £150 and summary criminal legal aid at £315.
- The ABWOR payment of £150 will cover the work done up to and including the diet at which the plea of guilty is tendered. It will therefore include any preliminary plea, plea in bar of trial and continuations without plea and, in addition, will include a first or second deferred sentence.
- It will not include the following, each of which will be payable separately as an “add on”:
 - Bail appeal (£50);
 - Conducting a proof in mitigation beyond the first 30 minutes (£50);
 - Third and subsequent deferred sentences (£25); and
 - Additional payment for hearing where a social enquiry report is considered by the court during one of the first two deferred sentences (£25).
 - An appeal under Section 174(1) of the 1995 Act, which will be chargeable on a detailed basis in addition to the fixed payment for the summary proceedings.

- The summary criminal legal aid “core” fixed payment of £315 will continue to include all work done up to and including the first 30 minutes of trial but will now subsume work done under advice and assistance (excluding an exceptional police custody visit) and ABWOR (now possible with the extension of the availability of ABWOR to CWP procedure). It will also include up to two deferred sentences.
- It will not include the following, each of which will be payable separately as an “add on”:
 - Bail appeal (£50);
 - Conducting a trial for the first day after 30 minutes;
 - Second and subsequent trial days;
 - Third and subsequent deferred sentences (£25); and
 - Additional payment for hearings where a social enquiry report is considered by the court during one of the first two deferred sentences, at £25 (payable once per case);

Payments for an accused person appearing from custody or on an undertaking to appear in the sheriff/stipendiary magistrate and JP courts

Duty solicitor

- Duty solicitors appearing in either the sheriff/stipendiary magistrate’s or JP courts will be paid £70 for work done on the day for each accused appearing from custody or on an undertaking for which a plea of guilty is tendered. Further work will be paid for up to the limit of the “follow-up” cap, to be increased to £150 (which includes the £70). Work in connection with a CWP as well as a guilty plea will now be covered by the follow-up arrangements. The Board will have discretion to lift that cap in appropriate cases.
- Duty solicitors will be paid for work undertaken for an accused appearing from custody or on an undertaking where a plea of not guilty is tendered, or the case continued without plea, under the current system of an initial appearance fee followed by subsequent per capita appearance fees. The rates, for these will be increased to £63 and £9 respectively. Thereafter, the cap for each session will rise to £140 and £93.

Appointed solicitor

- An “appointed solicitor” (solicitor of choice) will be able to represent a client appearing from custody under ABWOR. ABWOR will only be available from the appointed solicitor in custody cases where the solicitor with whom the person appearing in answer to the Complaint has (or has had) a solicitor and client relationship that is demonstrable by reference to circumstances apart from those relating to the appearance. The solicitor, having taken instructions, must also be able to act immediately, in person or through the services of another solicitor (other than the duty solicitor), at the pleading diet.

In the sheriff or stipendiary magistrate’s courts, the appointed solicitor will be paid the case disposal fee of £515 and in the JP court at a fee of £150 on the same basis as described above.

Other Provisions for Summary Criminal Legal Aid

- The “14 day rule”, prescribing the timescale from the pleading diet when an application for legal aid needs to be submitted, will be retained. The Board will still have the discretion to accept a late application.
- The Board will ask for details, where appropriate, of any plea the Crown is prepared to accept when considering an application for criminal legal aid.
- The Board reserves the right to request sight of the disclosable summary of evidence for the case where the information accompanying the application is insufficient.
- Rationalisation of advice and assistance and summary criminal capital limits (2008/09 level set at £1,561), the latter being subject to the undue hardship test.

APPENDIX E - GLOSSARY

ACPOS	Association of Chief Police Officers Scotland
ASB	Anti-social behaviour
CJB	Criminal Justice Board
COPFS	Crown Office and Procurator Fiscal Service
DM	Direct Measures
FCO	Fiscal Compensation Offer
FE	Fines enforcement
G&S	Court A and Strathkelvin
GHI	Grampian, Highland and Islands
JP	Justice of the Peace
L&B	Lothian and Borders
MIS	Management Information System
NS	North Strathclyde
SC	Sheriff Court
SCS	Scottish Court Service
SJR	Summary Justice Reform
SLAB	Scottish Legal Aid Board
SPS	Scottish Prison Service
SSDG	South Strathclyde, Dumfries and Galloway
TCF	Tayside, Central and Fife
PD	Pleading Diet
ID	Intermediate Diet
TD	Trial Diet
ABWOR	Advice by Way of Representation
SCLA	Summary Criminal Legal Aid
A&A	Advice and Assistance
PF	Procurator Fiscal

Participant interviews

AF	Accused face-to-face interview
CF	Court staff face-to-face interview
DSF	Defence solicitor face-to-face
PF	Police face-to-face
PFF	Procurator Fiscal face-to-face
SF	Sheriff face-to-face
DST	Defence solicitor telephone interview
PFT	Procurator Fiscal telephone interview

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