Reforming Scots Criminal Law and Practice: Reform of Sheriff and Jury Procedure

Response to consultation

March 2013

For further information please contact:
Jodie Blackstock, Director of Criminal and EU Justice Policy
Email: jblackstock@justice.org.uk Tel: 0207 7626436
John Scott QC, Vice-Chair of the Scottish Executive Committee
Email: scotland@justice.org.uk Tel: 0131 553 4333
JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100
Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance access to justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland.

2. In general terms we welcome proposals to improve efficiency in our criminal courts. We welcome also the Scottish Government's acknowledgment of the cornerstones of the criminal justice system, namely the right of any accused person to plead not guilty and the need for the Crown to prove guilt. It is important that any changes implemented do not become a means simply of increasing guilty pleas regardless of their appropriateness in order to improve efficiencies.

3. Many of the recommendations relate to technical and procedural changes which the profession is better placed to respond to. However, there are a number of areas which could impact on the fairness of proceedings for the accused which we highlight below under the consultation topics.

4. We also consider that there are some areas not considered in the Consultation Paper which will need attention to ensure that the reforms proposed are effective in practice. Firstly, there is currently a considerable gap in legal aid regulation in criminal cases, especially in relation to adequate payment for early resolution. We consider that necessary legal aid changes should be made concurrently, to reflect and support the new legislation. Secondly, steps to agree quicker and better sanctioning of expert witnesses for the defence (such as approved lists of experts) should also be prioritised in order to ensure that trials are ready within a reasonable period of time.

5. We understand that the use of new technology is being considered in order to make the system more efficient. We understand that this is still at a relatively early stage of testing and piloting. It is important that changes are not made in anticipation of success in untested or inadequately tested technology. It is also worth bearing in mind that such changes may require further investment on the part of solicitors in private practice who already have to bear the costs of their own computer systems,

as well, often, as case management software. Proper consultation with the legal profession is essential to make sure any changes are understood and are workable.

Statements to Accused

6. We agree that statements to the accused should help to make clear the factors which are relevant in the sentencing process, and therefore they may reduce the number of unnecessary trial diets fixed, as an accused who may plead guilty should be better informed as to the advantages of doing so sooner rather than later. This will assist in preventing victims and witnesses having to go through the ordeal of giving evidence in cases where a guilty plea is clearly appropriate. However, some accused, for whom a guilty plea is inappropriate, may feel increased and undue pressure to plead guilty even though they should not do so. The statements must therefore make the presumption of innocence and the burden upon the Crown clear, before explaining the credit for a guilty plea. This is particularly important with changes to the legal aid structure, which may mean more accused appearing unrepresented.

The Compulsory Business Meeting (CBM)

7. Efficiencies in the timetabling of CBMs will only be successful if full disclosure is made available and with sufficient time to consider the evidence contained therein prior to the meeting. We understand that solicitors are still experiencing deficiencies in disclosure, such that it is not always available within the stated time limits. If disclosure is not provided as it is supposed to be, meetings in such cases may waste time and resources, as well as incurring further delays.

8. Equally, there will need to be allowance for cases where legal aid has not been granted. The grant of legal aid is more difficult in some cases now due to the need for verification of means. Sometimes legal aid is not granted for several weeks or months and this might mean that the defence is unable to fully and properly participate in meetings if, for example, defence reports are needed. Without being able to participate, the interests of the accused will not be fully protected.

Time Limits

9. In practical terms there may be an argument for acknowledging that the current 110 day time limit between full committal and trial where the accused is in custody

requires extension in some cases. However, there is no analysis as to why a wholesale extension to 140 days is appropriate. That this is the period which applies in the High Court is an insufficient reason because cases heard in the High Court are generally much more complex. The 110 day time limit has been described as the 'jewel in the Crown' of the Scottish justice system.[1] It has been one of the reasons our system has avoided some of the problems experienced in many other countries.

10. However, It has been eroded in practice over many years and we consider that efforts ought to be made to identify what cases require further extensions rather than abolish the 110 day period completely. We are reinforced in our concerns by the experience in the High Court since the Bonomy reforms. The 140 day time limit for custody trials to commence has been ignored to a significant extent, with extensions granted so frequently as to appear almost routine. The reasons for extensions vary, including, for example, late disclosure of forensic reports requiring further time for the defence to respond and the availability of counsel. It is important that the same laxity does not feature in Sheriff and Jury cases, such that a slippage of the 140 day time limit occurs here also, were it to be applied. Not only is the accused entitled to a trial within a reasonable period of time, given the circumstances of the case against them, pursuant to article 6 ECHR, but they are also entitled to only be detained for a reasonable period of time pursuant to article 5 ECHR. Whilst the Scots system may apply more rigorous time limits than other jurisdictions, this is not a reason to extend them arbitrarily where the delays are for reasons which could themselves be the focus of efficiency improvements. The accused person should not have to suffer unnecessary delays endorsed by statute.

TV Links

11. We are very concerned at the prospect of accused persons having to plead guilty by television link. We acknowledge that links reduce the risks of delay in persons being transported from prison to court and the pressure placed on cells in courts. However, this push for expediency should not be to the detriment of an accused receiving a fair hearing. There are inherent risks in live link proceedings that ill-treatment, misconduct by public officials or other issues such as self-harm, illness, fitness to plead, etc will not be noted by the court or lawyer and/or that the detainee may feel

[1] See Lord Bonomy, *Improving Practice – the 2002 Review of the Practices and Procedure of the High Court of Justiciary*, available here http://www.scotland.gov.uk/Publications/2002/12/15847/14131, Chap. 9, [9.1]

inhibited from confiding in the court or lawyer as to such matters. The European Committee for the Prevention of Torture (CPT) made the following comments in its report following its 2007 visit to the UK, regarding pre-charge detention in terrorism offence cases:[2]

> As the Committee has emphasised on previous occasions, one of the purposes of the judicial hearing should be to monitor the manner in which the detained person is being treated. From the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of the judge. Further, it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video conferencing link.
>
> In their response to the report on the CPT's November 2005 visit, the United Kingdom authorities stated inter alia that the judicial authority concerned "has ultimate responsibility for deciding whether the physical presence of a detainee at a hearing is necessary". The CPT cannot agree with such an approach; the physical presence of the detainee should be seen as an obligation, not as an option open to the judicial authority[2]. As regards more particularly the first possible extension of detention beyond 48 hours, the physical presence of the detained person at the judicial hearing would also appear to be a requirement by virtue of Article 5, paragraph 3, of the European Convention of Human Rights. In the Grand Chamber judgment of 12 May 2005 in the case of Öcalan against Turkey, the Court stated that the purpose of Article 5(3) is to ensure that "arrested persons are physically brought before a judicial authority promptly". The Court went on to comment that "Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment".

12. The point at which a plea is entered in a case creates serious implications for the liberty and reputation of the accused. They should have the benefit of effective legal advice as to whether it is appropriate to enter a guilty plea in their particular

[2] CPT/Inf (2008) 27, paras 9-10.

circumstances, and for counsel to ensure the plea is unequivocal, as well as representation. Often it will not have been possible for the solicitor to meet the client prior to this hearing to fully discuss the plea, usually through delays in legal aid and/or disclosure, or the unavailability of a Procurator Fiscal Depute. Even if they have been able to, there may be further questions and issues which need to be discussed at the court hearing which cannot properly take place by way of a television link, not least if additional documents (such as an agreed narrative) must be considered. Nevertheless, dubiety about the correctness of a guilty plea can occur even when an accused signs the confirmation of the plea of guilty. Such dubiety is likely to increase if they are not actually present. The requirement that the accused sign the plea of guilty is therefore an important feature of solemn procedure, at practical and symbolic levels. It represents a crucial safeguard that cannot be replicated by way of a television link. It is important that the accused be present when he/she pleads guilty.

13. This appears to be a change aimed primarily at saving money. If these proposals are to be pursued at all, there must be safeguards put in place, such as that the sheriff must be satisfied that it is in the interests of justice to give a direction for a live link and that the sheriff must not give a direction until parties have had the opportunity to make representations. In particular, the link should not be available in case where an interpreter is required or an appropriate adult.

Written Narrations

14. If written narrations of agreed facts upon which a guilty plea is based are to be made available to the courts we agree that these will provide greater clarity and certainty, especially for the accused and the Court. An agreed narrative would be likely to reduce the need for proofs in mitigation, which can arise where a key Crown assertion is the subject of dispute that cannot be resolved by quick discussion. However, in the High Court, the use of agreed narratives is a practice that has developed over time. Those practising at the Sheriff Court may have little experience of such a method of presenting information to the court and therefore some time and flexibility must be built in to ensure that the accused has the opportunity to agree the narration that will be handed to the court. The written narration should also not prevent the defence from raising any mitigation and sufficient court time will still be required to ensure that sentencing hearings fully explore the mitigation arguments available to the accused. It is worth noting that agreed narratives do not always cover

elements of mitigation. Because of this, a written narration should not be provided to social workers, the Parole Board, prison authorities or any other external body which is not present in the courtroom and does not benefit from the mitigation or sentencing remarks, unless the narrative is amended to include the mitigation offered.

Jodie Blackstock
John Scott QC
JUSTICE Scotland
18th March 2013