

Criminal Justice Directorate

Criminal Procedure Division

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Mr Gerry Considine
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Your ref: LM/JG

9 November 2007

Dear Mr Considine,

Lindsay Montgomery has passed to the Scottish Government a copy of your letter to him dated 9 October, in which you seek background information to the current consultation on proposed changes to summary criminal legal assistance.

As the legal aid costings have been based on a range of underlying assumptions and projections developed by the Scottish Government in working up the summary justice System Model, I thought it would be helpful to write to you to provide information from the Scottish Government to complement a response from the Legal Aid Board. We intend to make this information available to criminal bars across the country, as a further contribution to the consultation process. Providing you are content, we propose to do so by sharing this correspondence with the Law Society of Scotland.

As you know, the proposals for reforming legal aid are designed to complement and reinforce the Government's agenda for summary justice reform. More specifically, the legal aid proposals are intended to buttress the new approach to case handling set out in the System Model paper, published in September, and to ensure that solicitors are paid appropriately for work properly done. That paper was developed within the Scottish Government's Summary Justice Reform programme by a project board on which all the main criminal justice organisations, and the Legal Aid Board, are represented.

The key elements of the Model are: reducing the amount of court time taken up with the prosecution of relatively low-level crime; enabling summary cases which enter the court system to reach a resolution at the earliest possible stage; reducing the waste and expense associated with the scheduling of trials that never take place; and bringing forward the entering of guilty pleas. (This last has sometimes been misconstrued as an ambition to increase the proportion of guilty pleas: the Government's aim is to accelerate such pleas, not to increase them.)

In essence, the Model seeks to address the two most significant problems for the public and those who work in the summary courts today: it takes far too long for cases to reach a conclusion and the vast majority of cases which are set down for trial do not actually proceed to trial.

The System Model paper proposes a major and integrated programme of change which, in the Government's view, will alter the volume, composition and distribution of business in the summary courts. It is not however a programme which simply adjusts existing ways of doing things. Many of the reforms – for example, compensation offers and work orders – are wholly novel and their impact cannot be gauged by extrapolating from past trends. Necessarily, therefore, reasonable assumptions have had to be made about how far, and in what way, certain changes will affect criminal justice business. Each of these assumptions rests on factors which may vary over time and by place.

To illustrate the point. The introduction of police direct measures – discretionary warnings, fixed penalties for anti-social behaviour and written warnings – is expected to reduce the absolute numbers of police reports across Scotland. There is data from a pilot exercise in one part of the country to help inform an assumption about what that reduction might be; but one cannot assume that police fixed penalty notices will have exactly the same impact everywhere. Local circumstances – patterns of crime, policing practice and priorities – differ. So a judgment has to be formed about what can reasonably be expected overall, allowing for local variation. Similarly, the extension of Procurator Fiscal direct measures is intended to allow suitable cases to be dealt with quickly and proportionately without taking proceedings in court (primarily, the district and JP courts); but again, the precise impact will depend on a range of factors – not least, the exercise of independent prosecutorial judgment in individual cases and the behaviour and instructions of the accused and his advisors.

In short, the Government's view is that summary justice reform does not lend itself to hard forecasts. The assumptions set out below are the best judgment of experienced practitioners within Government. They are not predictions, far less targets. The Government are not intending to use them to generate precise outcomes. They are *projections* as to what *could* happen to summary business and how it *might* look once the reforms bed in, based on a certain set of *assumptions* about how the accused will react to change. They take as a starting point the assumption that detected crime and therefore the number of crimes to be dealt with by the criminal justice system will remain static.

Police fixed penalties

The increased use of police fixed penalty notices (FPNs) is expected to reduce the number of police reports submitted. The Government expect this reduction to lie within the range of 5-15%. They have invited the Legal Aid Board to take the mid-point – 10% – as the starting point for the Board's own calculations. Of course, not all police reports result in criminal proceedings in court so it is not possible to make a direct link between reports and legal aid.

Procurator Fiscal direct measures

The Government project that the increased range of direct measures available for use by Procurators Fiscal could lead to a decline in the number of cases in court of 10-20%; again, a mid-point – 15% – underpins the Board's own work. Forming reasonable assumptions as to the likely long-term rate of challenges to direct measures is extremely difficult, for the reasons set out earlier. The Government's working assumption is that a relatively small proportion overall – around 10% – of persons offered a direct measure by the Procurator Fiscal will insist on a hearing. This figure was also included as an assumption in the consultation. A proportion of these cases which are currently before the courts result in immediate pleas of guilty (often by unrepresented accused). This again means that it is

difficult to use these assumptions to predict reliably the impact of Procurator Fiscal direct measures on legal aid payments.

Business distribution across courts


The Government are seeking to enlarge the jurisdiction of the district and JP courts in relation to road traffic accident cases where disqualification is discretionary. The Government estimate that this may move some 8,500 cases from the Sheriff to the District and JP courts. A number of cases – around 550 – could have their cases heard in the Sheriff summary court rather than before a jury as a consequence of the increase in summary sentencing powers in the 2007 Act. The pie-charts included at Annex A to the System Model are intended as a broad graphic illustration of the Government's intentions: to relieve congestion in the Sheriff Court by increased use of direct measures and transfer of appropriate business into the District and JP courts to maintain business levels there at least at present levels.

This, then, is the scenario on which the Board has developed its own proposals and its own modelling of options for legal aid reform.

As reforms are implemented in the coming months, their impact will of course have to be monitored carefully to test whether all these projections are indeed reasonable. The Scottish Government are discussing with criminal justice organisations and with the Board what the focus of monitoring and evaluation should be; and they will be consulting with local criminal justice boards – and their SJR implementation groups – to seek their views on a set of key monitoring data.

We would be happy to discuss any aspect of this letter.

Yours sincerely



Roma Menlowe
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