



**Scottish Parliament Justice Committee
Summary Justice Reform**

The Law Society of Scotland's Memorandum of Comments

January 2010

INTRODUCTION

The Law Society of Scotland welcomes the opportunity to submit comments on the Summary Justice Reforms to the Justice Committee. These written submissions have been prepared by the Law Society of Scotland's Legal Aid Negotiating Team (formerly the Law Society Summary Review Group). The members of the Law Society's Negotiating Team are:

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PRELIMINARY COMMENTS

We are practitioners in Airdrie, Livingston, Stirling, Hamilton and Edinburgh respectively. Our practices are involved either wholly or chiefly in criminal legal aid work.

We have been involved in discussions on behalf of the Law Society since 2007, mainly with the Scottish Government and Scottish Legal Aid Board, and we have represented the Society in the formal review process. This has involved a number of meetings where all the major stakeholders in Summary Reforms have been present. We have also had a number of meetings with the Cabinet Secretary for Justice.

Although our initial involvement was intended to relate primarily to Legal Aid our contribution has obviously expanded well beyond that. We have been prepared to work with others on all aspects of the Reforms. We are (or will be) involved with each of the Research Advisory Groups ("RAG") which are looking at various aspects of the Summary Reforms, namely:

- Direct Measures
- Legal Aid and Disclosure
- Fines Enforcement

- Bail and Undertakings
- Lay Justice
- Victims, Witnesses and Public Perceptions
- Summary Justice System Performance - an evaluation of national and local implementation of the SJR System Model

Not all of the RAGs have yet started their work. A better indication of the value of some of the Reforms may well come in the work of the RAGs.

We have consulted with the profession on the legal aid aspects of the reforms. We have made ourselves available to the profession in order that they can keep us advised on issues relating to all aspects of the Summary Reforms, not merely those to do with legal aid. Many practitioners in different parts of the country have been in touch with us.

There is a useful summary of some aspects of our involvement in the process on the website of the Law Society of Scotland at:

[http://www.lawscot.org.uk/Members Information/legal aid/summary criminal legalassistance .aspx](http://www.lawscot.org.uk/Members%20Information/legal_aid/summary_criminal_legalassistance.aspx).

This includes copies of our communications to the profession.

For the sake of completeness we should point out that the Glasgow Bar Association (“GBA”) has taken a different line in relation to engagement with the Reforms. Gerry Considine, past President of the GBA, was a member of our Team until June 2008 when the GBA again took industrial action in protest at the Reforms. Since then we have had discussions with the GBA and input from individual Glasgow practitioners but there is currently no Glasgow solicitor on the Team. It should be noted, however, that we recently invited a senior Glasgow practitioner to join the Team and we await his reply.

HISTORY

The Summary Reforms were wide ranging and aimed at improving the administration of summary justice by increased use of Direct Measures and the introduction of more efficient

systems in the Courts.

In addition to the work of our group, the Society's Criminal Law Committee was actively engaged in consultation on the Reforms, responding first of all to Sheriff Principal McInnes's Review of Summary Justice in 2003 and then to the proposals which were contained in the Criminal Proceedings etc (Reform) (Scotland) Bill in 2006. In so doing, the Society expressed the view that there was a balance to be struck between the need for efficiencies in the justice system and the rights of the accused. Dealing with offences outside of the court system would need to be backed up with measures to ensure that individuals facing a fiscal fine have sound legal advice.

The proposed Reforms were radical and we had concerns that they may go too far, well beyond the removal of the minor cases. Both formally and informally we monitored the changes and asked the profession to keep us advised of any developments which seemed unintended and adverse.

THE REFORMS

In the early days of the Summary Reforms we observed for ourselves, and were made aware of, cases which had been diverted from court but which seemed inappropriate for alternatives to prosecution, whether because of the serious nature of the charge or the accused's previous convictions. Some of these were also publicised in the media. Some were brought to the attention of MSPs by individual solicitors and Bar Associations.

We appreciate that there have been other formal steps taken to review the Reforms. In general terms we recognise that there have been efforts to address some of the early concerns, but the profession still comes across some examples which cause concern.

In addition to these matters relating to the Crown we have concerns about the increased use of direct measures by the police. While this was an essential part of the Reforms it seems to us to be an area of decision-making which has not seen the same level of scrutiny as that afforded to the Crown. Many thousands of cases have been removed entirely from any

consideration by the Crown¹. We would wish greater reassurance that these cases are also being dealt with in a consistent manner, and that the use of direct measures by the police is properly scrutinised.

As part of our involvement in the Review process we advised that we could not accept as accurate or safe those estimates which were based on the suggestion that many alleged offenders would challenge the direct measures. This did not conform to our experience with our own clients and their approach to even important matters of personal administration. Neither did it conform to the police pilot of direct measures in Strathclyde where the rate of challenge was negligible. Nonetheless these estimates of significant rates of challenge remained in place and informed parts of the reforms, notably the System Model for legal aid changes.

With the reality of almost no challenges following introduction of the Reforms, the Cabinet Secretary for Justice accepted that there would need to be some recalibration to ensure that there were no unintended problems caused by the Reforms, in particular in relation to legal aid. The Reforms were intended to produce a 6% reduction in the Summary Legal Aid budget. Had there been no change to the Legal Aid regime for summary cases we were told that the reduction would have been 18%. In the event spending on summary criminal cases fell by 4.4% or £2.4 million, while the overall spending on criminal legal assistance fell by 6.6% to £103.2 million. Unsurprisingly, the cut in expenditure has been a cause for concern in the profession, especially given the lack of any increase in most aspects of criminal legal aid fees for 18 years. Nonetheless at a Special General Meeting of the Law Society in August 2008 we secured the support of a majority in the profession to continue with the course of positive engagement and negotiation.

We engaged positively with the consultation on the Legal Aid changes. The Summary Reforms would not have worked without the goodwill and constructive approach of the profession. This is in no small part due to our suggested changes in relation to legal aid. Our amendments gave increased priority to early resolution while attempting to ensure adequate remuneration for cases which have to proceed to trial. Naturally such radical changes may

¹ Over 40,000 from July 2008 to March 2009 (Direct Measures RAG)

require adjustment and we have engaged positively with the Scottish Government and SLAB in addressing the areas of concern and unintended consequences. These discussions have not always resulted in our concerns being met but we continue to feel that the process is worthwhile, with the Government and SLAB agreeing to consider our representations and, in some instances, making appropriate change.

It should be noted that we recognise the complete change in culture and practice at the Crown. Without the additional information, now routinely available at a much earlier stage in a case, the Summary Reforms could not work. The extra effort by all parties at the outset has seen marked savings in expense to the Justice System and avoidance of inconvenience to victims, witnesses and other court users.

ACCESS TO INFORMATION

At our formal review meetings we have been provided with information about aspects of the Summary Reforms. Indeed the civil servants involved have been extremely helpful and have responded positively to all our requests.

However, in order to better understand some of the information we are given, we recently sought access to data from the National Criminal Justice Board. Indications are that this may be denied, although formally the issue is still being explored. We understand that certain key stakeholders are reluctant to see us having this access on the basis of confidentiality. The Negotiating Team recognise that any access to the data may come with a requirement for confidentiality, and we would observe this. We cannot, however, understand this apparent mistrust when we have engaged so positively and constructively with the process for a considerable time. We believe that our input, past and continuing, has helped to improve the Summary Reforms and try to ensure that justice is achieved just as much as speed and efficiency.

“OPT OUT”

Underlying many of our concerns about the Summary Reforms is the most radical change to

the approach to alternatives to prosecution. While in the past there has been some use of alternatives this was always done on the basis that an alleged offender would have to “opt in” to the process of less formal resolution.

In the Summary Reforms the alleged offender has to “opt out” of the direct measure. This worries us as the majority of our clients have problems with literacy, often having learning difficulties or even mental health issues. Many are chaotic drug users or alcoholics. We doubt that many for whom direct measures have been imposed have made an informed decision not to “opt in”. Rather we think that they have not understood their choices nor how to react if they wish to challenge the direct measure. This will lead to injustice in some cases and may already have done so.

CONCLUSION

Since the introduction of the Reforms it has been easier to see the part played by the defence solicitor in early resolution of cases. The Profession has been integral to the early success of the Reforms, despite a cut in legal aid funding. The future of the Reforms will continue, in no small part, to rely on a properly trained and funded Defence Bar.

The Justice Committee, as well as the Government, must have regard to its responsibilities towards those accused of crime but without the funds to pay for a necessary defence. With the Summary Reforms most of the trivial cases are removed from the system entirely. This means that those cases which are taken to court are more serious and increasingly likely to result in custodial sentences. As a consequence proper legal representation is more important now than ever before.

We appreciate that these are challenging times. Many are unemployed today who were working until recently. We see in our daily practice some of the other negative consequences of the problems in the economy. Nonetheless there will be a recovery at some point. We are anxious to ensure that this important area of the law is not neglected in the meantime. The Cabinet Secretary for Justice has promised to keep the legal aid aspects of the Summary Reforms under continuing review. We welcome his direct involvement with the review and his

commitment to address any unintended consequences. We believe that the review process associated with the Summary Reforms is a good example of partnership working between all of the key stakeholders in the Scottish system of criminal justice.



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