



Evidence and Procedure Review

FOLLOW-UP REPORT TO THE PROPOSITION PAPER:

A NEW MODEL FOR SUMMARY CRIMINAL COURT PROCEDURE

September 2017

Introduction

1. In February 2017, the Scottish Courts & Tribunals Service (SCTS) published a proposition paper entitled *A New Model for Summary Criminal Court Procedure*. This was the next in a series of papers under the Evidence and Procedure Review, whose first report was published in March 2015 and was followed by the *Evidence and Procedure Review – Next Steps* paper in February 2016. The proposition paper published in February 2017 set out in some detail a potential new model for the summary criminal justice system that aimed to make fuller use of the technology that is available to secure a more effective and efficient means of delivering a fair trial for all.

2. The model had been developed by a small working group consisting of practitioners from all parts of the justice system. It was recognised that the model being presented would represent a major overhaul of the summary system, and that the proposition needed to be tested with a wider range of people with experience of the criminal justice system in order for it to be further developed and refined. A programme of engagement events was therefore carried out across Scotland, which took place in May and June of this year. This programme included seven roadshow events open to all with an interest, in seven locations across Scotland. They were attended by around three hundred people from a variety of backgrounds and included members of the public, defence agents, the judiciary, the Crown Office & Procurator Fiscal Service (COPFS), SCTS, Scottish Legal Aid Board (SLAB), Police Scotland and representatives from social work organisations. Comments were also welcomed at the Evidence and Procedure Review's email address.

3. The feedback from the engagement programme was analysed and considered by the original working group and the Evidence and Procedure Programme Board. This paper summarises both the feedback received and the further consideration of the points raised, and contains recommendations for how the original proposition might be further developed.

Summary of Issues Raised

4. Annex A to this paper provides a detailed list of the issues that were raised in relation to the various chapters of the proposition paper. The overriding key points to note in relation to the feedback are:

- There was considerable support for making improvements to the current system. Modernisation and enabling the sharing of evidence digitally were proposals which were generally well supported.
- Common concerns raised were around depersonalising the criminal justice system if too much is done online, with court appearances not required at the first calling and intermediate diet stages. Furthermore, attendance at court and a client's engagement with their defence agent were reported to be inextricably linked.

- There was considerable enthusiasm for the idea that a programme of “interim measures” should be established to allow for some proposals to be tested, in order to identify the extent to which they could bring about improvements to the existing system.

Specific Points Considered by the Working Group

5. The working group, all of whom had attended one or more of the roadshow events, was subsequently asked to consider the main themes arising from the process. These were as follows:

5.1 Depersonalisation of the summary criminal justice system from accused persons not having to attend court.

Working group response: The proposed model does not negate the need for court appearances. Hearings will still take place and accused persons may still be cited to attend court and be publicly held accountable for their actions. All custody cases will still be required to attend court (first calling). Case management hearings will be required where a sheriff is not satisfied that the case is progressing as per the timetable and where points in dispute require judicial intervention. Sentencing will still take place in the court room.

5.2 Sentencing in absence (digitally) and the impact of this on transparency of justice.

Working group response: It was viewed that digital sentencing would be done only in some cases and not the majority (e.g. current letter pleas, and other crimes where there is no identifiable victim) The key point in this matter is that the choice either to sentence in court or digitally would be a judicial decision.

5.3 Client engagement facilitated through the requirement of accused persons to attend court is likely to be compromised since there will be fewer hearings.

Working group response: It is recognised that there will always be some accused persons who will not readily engage with the justice system. This is a challenge in the current system and will be in the new system. There is no obvious solution to this and further discussion with the legal profession will be required to establish how they, and their clients, will adapt to the new procedure.

5.4 It was suggested that no longer setting the trial date at the outset of proceedings could remove the focal point towards which parties work, resulting in cases dragging on.

Working group response: Although there would be no trial date set at the start of the case management process, it is intended that the time-specific procedural steps set out in the case management letter will

focus parties' minds. The trial date will be set once a sheriff is content that the defence and prosecution are ready. Witnesses will then be cited.

- 5.5 Online pleas may detract from the experience of having to attend court which itself was suggested as being a strong deterrent for further offences being committed.

Working group response: In a modern digitally-enabled justice system the ability to enter a plea online should be one of the options available to accused persons. There is no evidence to suggest that attending court to enter a plea has any impact on future criminal activity.

- 5.6 Unrepresented accused will need more assistance to navigate this system.

Working group response: A case management hearing would be set up where someone is unrepresented to explain the process to them. There is also potential for a 'fast-track' less complex case management process for straightforward cases. It is anticipated that, where the accused is unrepresented, a case is more likely to be a straightforward one (e.g. a road traffic offence), and it might therefore be suitable for a fast-track process.

- 5.7 There should be sanctions available to the bench to impose for deliberate or negligent non-compliance with the case management process.

Working group response: There is no single straightforward solution to this. The avenue for impacting on legal aid payment requires further exploration. The most significant motivator for accused persons is likely to be that non-attendance will not interrupt court proceedings, and that hearings will still proceed where an accused person has not taken up their right to attend.

- 5.8 Trials in absence, although possible at the moment, are not routinely done.

Working group response: More investigation should be done on this and a pilot conducted to assess the impact on attendance levels, and subsequent appeals.

- 5.9 Email service of a summary complaint was thought to be insufficiently robust and unreliable.

Working group response: The working group noted the concerns that were expressed about service by email and suggests that service by email, and other electronic means, could be explored as an interim measure.

Revision to the Model

6. The model has been revised based on the same planning assumptions as those which applied to its first iteration. These are:

- The necessary digital enablers would be available (*digital case management system and Digital Evidence and Information Vault*).
- The enabling legislation would be in place.

7. In the main, the original proposal required tweaking as opposed to fundamental redesign. The key principles as set out in the proposition paper have been largely incorporated into the revised model. The exception to this relates to digital sentencing. Instead of the “majority of cases” being sentenced digitally, it was envisaged that the actual figure would be far less. The principles are as follows (*the change is marked in bold italic*):

- An intermediate diet and trial should not be allocated (and witnesses should not be cited) upon the lodging of a not guilty plea.
- All pre-trial procedure should take place as part of a digital case management process. Court hearings should only be used for contested preliminary pleas, issues or other preliminary or pre-trial applications (such as pleas to the competency or relevancy).
- Strong judicial oversight of the case management process should be applied to bring about more agreement of evidence where possible, and to ensure summary trials focus on what is truly in dispute.
- Citation of witnesses should be avoided unless the trial diet is very likely to proceed. Where a witness does have to be cited, a digital update system keeps the witnesses informed and minimises inconvenience wherever possible.
- In ***certain*** cases in which guilty pleas are tendered, sentencing could be conducted digitally without the need for a court appearance on the part of the accused.

8. In summary, there are three specific changes to the originally proposed model that the working group would recommend. These are:

- Service of a summary complaint by email, or other electronic means, should be explored further.
- Online pleas will be an option as opposed to the only available method.
- Digital sentencing will be an option for the bench. Sentencing hearings will remain a feature in the new model.

9. Although the working group made no specific recommendations on the following, there was recognition that further consideration prior to implementation will be required for:

- Online publication and transparency given the numerous concerns raised.
- Legal aid implications in supporting the introduction of the new procedure and driving changes to behaviour/culture.
- A review of the current sentencing discount system so that different discounts may apply at different stages of the process (e.g. prior to witnesses being cited, and on the day of the trial).
- The case management process and defining how it will operate in practice for cases in the Sheriff and Justice of the Peace Courts. Consideration may be given to a 'fast track' case management process where the case is relatively straightforward (e.g. some driving offences in the Justice of the Peace Court).

10 The working group continued to recommend that work be initiated to scope out and implement a number of interim measures. This recommendation has been accepted by the Evidence and Procedure Review Programme Board, and a group to take this work forward is being established.

Annex A - Feedback (per chapter) on the proposed new procedure

Chapter 1 – Designing an online digital summary justice system

1. This chapter discussed the foundations on which a new system would be established. This included an approach to sharing evidence digitally and a description of the functionality of a digital case management system.
2. The feedback in relation to better sharing of evidence was generally supportive although it was suggested that this in itself will not have the desired effect of resolving the issue of churn.
3. A strong sense of scepticism was expressed by a number of stakeholders in relation to the case management system, specifically in relation to the:
 - **Costs** involved in developing such a system.
 - **Complexity** and the risk of not being able to deliver (given the reputation of many previous public sector IT projects)
4. One respondent stated that, “Unless Ministers are serious about this and willing to put in a lot of money to making this happen, then this will serve to be nothing more than a distraction over the coming years.”
5. With regards to disclosure of evidence, many felt that this would be a positive step but questioned the resource implications, specifically for COPFS. At almost every roadshow, comments were made about COPFS being “overworked and under-resourced”. A number of points were raised about the capacity of COPFS to be able to disclose evidence digitally in the proposed timescales.
6. An additional concern expressed about the early disclosure of evidence related to the impact on victims and witnesses. One respondent stated, “If an accused knows what the evidence is at an early stage, then they may be in a better position to intimidate witnesses or the victim.”
7. It was also suggested that early disclosure of CCTV (and not witness statements) is key to earlier resolution of a case. Questions were posed how evidence would be translated into a form usable in court.
8. Various comments were made about digitisation and the ability of many accused persons to engage with a digitally-enabled system. It was suggested that some people will not have access to the appropriate technology or may be incapable. It was suggested that a significant proportion of accused would be unable to access and navigate a digital system, and that this group of society could potentially become even more marginalised than they are already. A question was raised about how the system would engage with people whose first language was not English, and the implications of someone pleading guilty to something they did not fully understand.
9. Concerns were raised in relation to domestic abuse, stalking and sexual offences where “anyone could read the information about the case online, whereas

currently anyone would have to be physically in the court.” It was felt that publishing the case details on line would compromise the privacy of victims.

10. The introduction of a digital system and the subsequent impact upon resources was commonly raised. This included comments regarding the impact on staffing resources and what future skills will be required to work within the justice system. Whilst some believed that the new procedure would de-skill staff, others felt that good technical experience will always be needed to ensure the efficient disposal of business.

11. Agents raised queries regarding the availability of rooms within courts to view CCTV with their clients prior to a hearing. Another common point raised was that some defence firms have not got the ICT infrastructure (nor the available funds to invest in one) to allow them to interact with a digital system.

12. Some respondents suggested that a digital system would do nothing to make the justice system more efficient if the same processes were just being made electronic. It was felt that basic processes need to be revisited and made more efficient before digitisation.

Chapter 2 – Commencing Proceedings Digitally

13. This chapter related to the electronic service of a complaint on accused persons via email.

14. The feedback received from the roadshows was generally not positive and suggested that the use of email was unreliable and may cause additional problems. The availability and accuracy of email addresses was a recurring feedback theme, with many respondents suggesting that a number of offenders were unlikely to have an email account and if they did, were unlikely to check it.

15. A suggestion put forward was that the police should not be involved in manually delivering and serving citations in this day and age. It was suggested that a unit be established within SCTS to do this.

Chapter 3 – Digital Pleas & Digital Sentencing

16. There was much feedback on the use of a digital system for an accused to enter a plea. Various objections were raised from the perspective that this would detract from the ethos of a public justice system. One respondent stated, “Criminal justice is about people and I am not sure allowing accused persons to enter a plea without coming to court is a good idea, you need to be careful that justice does not become faceless.” Another respondent thought that the psychology of the court experience was a powerful deterrent for many not to reoffend and that allowing online pleas would be too convenient for accused persons.

17. Another common theme emerging from each roadshow was the usefulness of the first calling in facilitating engagement between agents and clients. There was concern that without the first calling, then a number of accused would not meet with a solicitor at an early stage of proceedings. This was felt to be incompatible with achieving the objective of early disclosure of evidence and the tendering of earlier

pleas. Concerns were voiced that this would have implications for how and where agents conduct their business, since for some the court building is their office.

18. Views were also expressed that an accused has the right to be present to hear the Crown's narration of the case and the defence's response. It was felt that an accused person should not be deprived of this right.

19. In relation to digital sentencing, similar issues were raised around public justice and transparency. One respondent expressed concern that, "this feels like justice behind closed doors." Another respondent stated that the, "default position should be that disposals will be in public and the accused should be present". Other roadshow respondents felt there was little difference between what currently happens with letter pleas and the proposed approach with digital pleas and sentencing. It was suggested that digital pleas and sentencing would not be appropriate for some types of cases but no reason was seen why it couldn't be progressed for some less serious cases. One respondent suggested that digital sentencing could apply where there is no identifiable victim.

Chapter 4 – Case Management

20. Chapter 4 described the case management model where instead of the intermediate diet and trial diet being fixed at the first calling, a timetable would be issued which would set out the procedural steps to be adhered to. Strong judicial oversight would be required to manage the progression of the case and only when a sheriff was satisfied that the case was ready for trial, would the trial date be fixed.

21. This was one of the most widely discussed topics during the roadshows. The introduction of case management as an approach, and as a process (driven by a timetable) was met with many differing views.

22. In the context of a **case management approach**, many questions were raised about the role of the sheriff and whether the role of the bench would become more inquisitorial. Questions were raised about the sanctions which could be imposed by the bench for non-compliance with the case management process. In relation to the proposition that SLAB could take repeated or habitual non-compliance into consideration in the context of a firm's quality review, questions were raised on who would do this and how it would be done. Furthermore, concern was expressed that it appeared harsh potentially damage the reputation of a solicitor who was representing a client who was wilfully not engaging in the process. It was suggested that applying sanctions for non-compliance should be a matter for the bench. One respondent noted that the proposed sanction in relation to SLAB could not apply to privately funded defence cases, and wished to see stronger sanctions against defence agents who failed to comply with the process.

23. There were many views put forward that case management of such a high volume of cases would add considerably to the workload of sheriffs, and that this, on the back of the additional work associated with the simple procedure, would see sheriffs spending significantly more time in chambers. A further point was made in relation to the likelihood that it will take more time to watch CCTV as opposed to reading witness statements.

24. Opinions were expressed on the impersonal nature of case management and how this could impair the discretionary judgement exercised by sheriffs if they were not to have the accused in front of them. This was a common theme raised at most of the roadshows.

25. In the context of the **case management process (timetable)** there was a strong sense that removing the need to set a trial date at the start of the proceedings was not a good idea. Various respondents stated, “The date provides a focal point for everyone concerned.” It was felt by many respondents that without the trial date, there would be a risk that a case could drag on.

26. Various respondents described the implications for sheriffs who perform the case management role and the fact that this would preclude them from hearing the trial of a case they had previously managed. It was felt that although this could be overcome in larger courts, in smaller courts, or remote areas of the country, that would be more difficult.

27. With regard to intermediate diets, there were mixed views on just how effective these are across the country. Some areas suggested that “they are a waste of time,” but in other areas there was feedback that intermediate diets worked well. The removal of intermediate diets as a proposal was welcomed by some and regarded cautiously by others. One respondent felt that the removal of an intermediate diet would mean that churn would just occur at the trial instead.

28. Several respondents felt that summary justice was predicated on setting the trial date early in the process and for everyone to work towards that. Other respondents felt that any date, whether specified in a case management timetable, or for a scheduled court hearing, would all be dealt with at the “last minute” regardless. Reminders generated by the digital case management system were thought to be a useful prompt for defence agents and COPFS in the proposed new system.

29. Feedback was received that step 3 of the proposed timetable did not provide sufficient time for the defence agent to consider their position in light of evidence made available to them (currently 14 days). It was suggested that this should be longer, as there can often be difficulties in engaging with a client.

30. The roadshows heard how legal aid is a contributing factor in why cases are adjourned, as in some cases SLAB requires additional information which the accused has not provided. It was suggested by one respondent that legal aid should be granted for anyone applying, and then recovered should it subsequently become apparent that the accused is not entitled to it.

31. There were various comments made in relation to the agreement of evidence and the use of statements of uncontroversial evidence. Although statements of uncontroversial evidence were generally viewed as being a positive step, it was pointed out that they are time consuming for COPFS to produce. It was recognised that there is an obligation for parties to take all reasonable steps to agree uncontroversial matters but one respondent stated that “The accused can often take the view it is down to the Crown to prove everything against them and they won’t agree anything.”

32. Points were raised regarding the Justice of the Peace Court and the role of a summary sheriff conducting the case management. These included:

- Large numbers of unrepresented accused appear in the JP courts and that this process has the potential to be a lot less efficient.
- If case management is done by a summary sheriff then what is the future role of the JP Court?

Chapter 5 – Case Management: Custody Cases

33. No specific feedback was received in relation to this chapter.

Chapter 6 – Case Management: Unrepresented Accused

34. General feedback was received that unrepresented cases, although more common in JP Courts, do feature relatively frequently in the sheriff court. Comments were made in relation to the amount of phone calls received by court staff from unrepresented accused with many unaware that they have access to the evidence via COPFS. It was suggested that information on the conduct and procedure associated with criminal cases should be made available to accused persons.

35. The proposal of unrepresented accused being assisted by court staff to enter a digital plea was met with some scepticism. Various concerns were expressed about this including general practicalities, training, and protection of women in domestic abuse cases.

Chapter 7 – Desertion of a case by COPFS

36. No specific feedback was received in relation to this chapter.

Chapter 8 – Legal Aid

37. Legal aid was discussed at a number of roadshows with many comments received about the importance of getting legal aid right to encourage good practice. No specific comments were made regarding the suggestions made in chapter 8.

Chapter 9 - Online Publication and Transparency of a Digital System

38. At several roadshows, points were raised regarding the publication of information online and the impact this could have on an individual since that information could be accessible in perpetuity.

39. It was suggested that online publication could have an adverse impact on the rehabilitation of offenders, and could potentially deter some victims from reporting a crime for fear of intimidation.

Chapter 10 – Digital Interaction with Victims and Witnesses

40. The proposition for better interaction with victims and witnesses was broadly welcomed although the same concerns around access to technology were raised. One respondent stated, “If a witness isn’t going to engage with the current process, then they’re less likely to engage with a digital one.”

41. Other views expressed felt that better and more accessible information for witnesses would be a positive step, and that the number of phone calls to court offices would dramatically reduce as a consequence.