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THE CITY OF EDINBURGH COUNCIL

Item no 8.5
Report no cec/07/04-05/cs

Report of the Summary Justice Review Committee – "The McInnes Report"

The City of Edinburgh Council

27 May 2004

1. Purpose of Report

1.1. To outline the details of the publication of the report of the Summary Justice Review Committee – "The McInnes Report" and the implications of the Report's recommendations for the authority, and in particular the District Court, it's staff, it's judges (Justices of the Peace) and the District Court estate.

2. Summary

2.1. In November 2001, the then Justice Minister Jim Wallace MSP announced the membership of a Committee appointed to review summary justice in Scotland under the chairmanship of Sheriff Principal John McInnes. The formal remit of the Committee was as follows:-

"To review the provision of summary justice in Scotland, including the structures and procedures of the sheriff courts and district courts as they relate to summary business and the inter-relation between the two levels of court, and to make recommendations for a more efficient and effective delivery of summary justice in Scotland."

3. Background

3.1. In summary cases a judge presides over a criminal court and determines matters of fact and law without a jury. At present two separate tiers of courts have jurisdiction in summary cases in Scotland –Sheriff Courts and District Courts. Sheriff Courts are administered by the Scottish Court Service; District Courts are administered by local authorities. Judges in District Courts (excepting Glasgow Stipendiary Magistrates Court) are Justices of the Peace, i.e. lay persons who receive no remuneration but may claim financial loss allowance from the authority.

3.2. Funding from central to local government includes an element for the provision of a District Court within an unhypothecated revenue support grant. The Clerks of the District Courts are Solicitors appointed by and employed by the local authority who advise the justices on matters of law, practice and procedure.

3.3. Justices of the Peace have existed since the sixteenth century. Appointments are made by recommendation from local Advisory Committees to Ministers, of persons considered to be suitable in terms of character, integrity and understanding. The Justice of the Peace, along with jury service, is the current embodiment of lay participation in the criminal justice system.

3.4. The Summary Justice Review Committee

The McInnes Report was published in March 2004 making 140 recommendations (Appendix 1) on a number of significant issues including the structure of the summary justice system, the procedures to be followed in the summary courts, proposals for a more active judicial role in court management; and monitoring and evaluating system effectiveness. This Council report only seeks to cover the following recommendations which directly affect the authority as the body responsible for administering the court.

3.5. **McInnes Report Recommendations**

3.5.1. Unified Summary Court System *(Recommendations 1 & 2)*

The Committee unanimously recommends the unification of the administration of the summary Courts under the Scottish Courts Service, thereby removing any local authority involvement in the summary courts system. This is despite a COSLA consultation which indicated that the majority of local authorities did **not** support unification on the grounds that summary justice would be less accessible and accountable in a centralised regime.

The Committee felt strongly that unified administration of the summary court system offered scope for a more efficient, transparent and accountable court system, better able to respond quickly when change is required stating "preliminary assessment of the size of the estate and of staffing required suggests scope for long term efficiencies."

Implications for Edinburgh District Court

Unification would have implications for 22 Full Time Equivalent Staff within Edinburgh District Court, Legal Services Division. The report recognises that "a good deal of further work would require to be done in partnership with COSLA" and that "consideration would require to be given to arrangements to protect the interests of staff whose transfer to the Scottish Court Service (SCS) is required; and scope for local authorities to absorb staff whose transfer to SCS is not required." There may well be TUPE implications which will require to be addressed.

The report states that "COSLA and the Executive would need to consider the arrangements by which SCS could acquire or lease court buildings currently in local authority ownership and the financial implications for local authorities for courts which are no longer required. (The recently refurbished District Court premises are currently leased from Buredi over a term of just under 20 years, with less than 18 years remaining)

3.5.2. Judges in the Summary Court *(Recommendations 6 to 10)*

The majority of the Committee recommended that all judges be professionally qualified and recommends a new class of professional judge – "Summary Sheriff". A minority on the Committee whilst supporting the principle of

unification, did not believe that lay justice should be abolished and published a Note of Dissent (Appendix 2).

Implications for Edinburgh Court Duty Justices

These recommendations would result in the abolition of lay justice in the summary criminal system. Edinburgh Justices unanimously align themselves with the Note of Dissent (Appendix 2) and agree that "Lay justice is a powerful expression of community participation in the regulation of society". Lay justice draws into the legal process persons who are representative of their communities and able to address local issues and concerns. They believe that the abolition of lay justice would result in a reduction of inclusion, a reduction of partnership with the community, an erosion of best value, and the eradication of long-established and successful processes for democratic involvement in the legal process.

3.5.3. Alternatives to Prosecution *(Recommendations 14-20;24-32;and 33-38)*

The report recommends a number of changes that would increase the use of alternatives to prosecution with a view to reducing the number of less serious cases coming to Court, thus freeing up resources to focus on the prosecution of more serious crime. Recommendation 25 proposes increasing the maximum level of fiscal fines (fixed penalties for non-road traffic offences) from £100 to £200 or £500.

Implications for Edinburgh Court Duty Justices

The effect would be the removal of the judicial powers of JP's and investing them in Procurators Fiscal who will have little, if any knowledge of an offender's means or circumstances and the interests of justice will substantially be eroded. It is highly desirable to retain lay justice to deal with less serious crimes. There will be little deterrent value if all such offences are dealt with extra-judicially by accused persons simply accepting a fixed penalty.

3.5.4. Fine Enforcement *(Recommendations 130 –134)*

The report recommends that the Executive should give a single public sector delivery organisation – possibly a separate arm of SCS, or a separate public sector body – total responsibility for the collection and enforcement of all financial penalties including fiscal fines, registered fines and court imposed fines.

The Committee recommends that the new public body take a new approach to fines enforcement developing clear and graduated sanctions for non-payment and minimising the involvement of courts and the police. It would also seek to recover the costs of operations from surcharges where possible. A number of new powers to assist fine enforcement have been proposed with improvements to existing non-custodial sanctions with the elimination of imprisonment for default.

Implications for Edinburgh District Court

All court imposed fines are presently collected locally by the District or Sheriff Court that imposed the fine, with powers to transfer upon change of residence.. Similarly all fixed penalties imposed by the police and procurator fiscal are collected by district courts.

This would have a major impact on administrative and clerical staff within Edinburgh District Court as the vast majority of their duties and responsibilities lie in the enforcement of fines and fixed penalties and the subsequent reporting procedures necessitated by the relevant legislation.

The Report gives no clue or recommendation as to where such an organisation would be based, whether it would be in one or more location or whether it would have an office perhaps based in each Sheriff Court. SCS employ staff in each Sheriff Court for fine collection and enforcement of fines imposed by the Sheriff Court or transferred to it. No fiscal fines or fixed penalties of any type are paid to Sheriff Courts. These are only payable to District Courts at present and account for about 50% of admin / clerical workload.

4. Conclusions

4.1 The report has not made out a justifiable case for the abolition of lay justice.

4.2 The Scottish Executive are in the process of consulting on the recommendations in the McInnes Report. The closing date for responses is 16 July 2004.

4.3 Each Edinburgh court duty Justice has a copy of the report. The Justices Committee is framing a response which will adopt the Note of Dissent (Appendix 2) in addition to making other comments and suggestions. A number of justices may submit individual responses. A response will also be submitted by the District Courts Association of which the City of Edinburgh Council is a member.

5. Recommendations

5.1. To note the report.

5.2. To acknowledge that most of the evidential and procedural changes recommended will result in much needed improvements to the criminal justice system. (The main exceptions to this are detailed in the body of this report.)

5.3. To support the Note of Dissent (Appendix2) in respect of supporting the continuation of lay justice in the summary criminal justice system; and to oppose the recommendation that all judges be professionally qualified.

5.4. To support the Note of Dissent (Appendix2) in respect of supporting unification of the summary criminal courts, but to seek an assurance from Scottish Executive that full consultation will take place with COSLA, local authorities, and relevant Trade Unions to protect the interests of authorities as regards their staff and estate in the event of unification and / or establishing a national fines enforcement body

5.5. To note that a response will be submitted to the City of Edinburgh Council meeting on 24 June 2004 for approval for submission to the Scottish Executive; and to submit a copy thereof to COSLA for submission of a national local government response (see Appendix 3).

Jim Inch
Director of Corporate Services
19/05/04

Appendices	Appendix 1 – The Summary Justice Review Committee – Chapter 3 Summary of Recommendations Appendix 2 – The Summary Justice Review Committee – Annex A Note of Dissent Appendix 3 – Letter from COSLA to all Leaders and Convenors of Administrations (including 2 appendices)
Contact/tel	David Kemp, Depute Clerk – District Court Tel: 529 4167 david.kemp@edinburgh.gov.uk Gill Lindsay, Council Solicitor Tel: 529 4217 gill.lindsay@edinburgh.gov.uk
Wards affected	All
Background Papers	The Summary Justice Review Committee – Report to Ministers 2004

APPENDIX 1.

26 April 2004

The Summary Justice Review Committee: REPORT TO MINISTERS

Chapter 3: SUMMARY OF RECOMMENDATIONS

Note: references to "the 1995 Act" are references to the Criminal Procedure (Scotland) Act 1995, the main Act governing summary criminal procedure in Scotland at present. References in brackets after each recommendation relate to the chapters or paragraphs of the report considering that recommendation in more detail.

A UNIFIED SUMMARY COURT SYSTEM

1. We recommend the unification of the administration of the summary courts under the Scottish Court Service. (5.6 - 5.42)

2. We recommend that discussions on implementation of this proposal between the Scottish Executive and COSLA should begin as soon as possible. (5.42 - 5.46)

ALIGNMENT OF BOUNDARIES

3. We recommend that the opportunity presented by restructuring the summary court system should be used to ensure that sheriff court districts are, so far as is practicable, co-terminous with police and procurator fiscal operating areas and with local authority boundaries. (6.1 - 6.5)

4. We recommend that any consequent re-definition of sheriffdom boundaries should, so far as is practicable, be aligned with police and Crown Office and Procurator Fiscal Service (COPFS) operating areas and with local authority boundaries. (6.6)

5. We recommend that any future review of local government, police, COPFS or court boundaries should provide for full consultation with all justice system interests. (6.7)

JUDGES IN THE SUMMARY COURT

6. Following on from Recommendation 1, a large majority of the Committee recommends that we move to a system that employs only professionally qualified judges. A minority on the Committee takes a different view and have submitted a separate dissent (annex A) to that effect. (7.1 - 7.73)

7. We recommend that there should be a new class of professional judge to deal with summary business where there is a need. That judge should be known as a "summary sheriff". (7.74 - 7.83)

8. We recommend that while summary sheriffs would normally be based in a given locality, they would not necessarily be limited to a particular local jurisdiction, and could be used flexibly to relieve pressure in other areas. We recommend that some might be appointed on a part-time basis. (7.95)

9. We recommend that the criminal jurisdiction for judges in summary cases should be a maximum 12 months detention or imprisonment and a £20,000 fine. There is no reason for a distinction in this respect between sheriffs and summary sheriffs. (7.84 - 7.93)

10. We recommend that consideration be given to summary sheriffs having some civil jurisdiction in addition to the criminal jurisdiction we have suggested. (7.96)

OPTIONS FOR THE POLICE IN RELATION TO MINOR CASES WHICH DO NOT REQUIRE TO BE REPORTED FOR PROSECUTION

11. We recommend that the police make full use of non-reporting options, and that guidance be issued by the Lord Advocate extending the types of offences which may be dealt with by the police on an informal basis. (8.1 - 8.4)

12. We recommend that there ought to be reasonable consistency across the country in relation to types of case which the police are directed not to report. We recommend that the proposed criminal justice boards should address this issue. (8.6 - 8.11)

13. We recommend the introduction of a system of formal recorded police warnings. These warnings should not require an admission of guilt. They should be accessible to police and procurators fiscal for a period of not less than 2 years and not more than 5 years from the warning. They should not be referable to in court proceedings. (8.12 - 8.20)

FIXED PENALTY NOTICES

14. We recommend that consideration be given to increasing the scope of FPNs to a number of non-road traffic offences. The scope for extending the use of FPNs to other statutory offences, particularly those of a regulatory nature, should be explored. (9.1 - 9.13)

15. We recommend that, in a subsequent prosecution for a similar offence, the Crown should be able to refer to previous FPNs that have been imposed in relation to similar offences committed by the accused within a certain period in the past - not less than 2 years and not more than 5 years. (Ch. 9)

16. We recommend that when a case is disposed of through the offer of a FPN the disposal of the case should be disclosed to any person having a legitimate interest in knowing its outcome on request - for example, the victim. (9.18)

17. We recommend that it should be necessary for the person to whom an FPN is issued to take positive action, if he or she wishes to contest the issue in court. If that person chooses to do nothing, the FPN will become a registered fine on the lapse of a fixed period. (9.15)

18. Further, we recommend that all unpaid FPNs which are registered as fines should be registered at the sums shown on the FPN with a 50% increase. (9.15)

19. We recommend that, where an accused is convicted having declined the offer of a FPN, the court should be advised of the amount of the offer made and declined and that the court may take this into account when imposing sentence. (9.17)

20. We recommend that fixed penalty notices be redrafted so as to set out the rights and obligations applying to them in clear terms. (Ch. 9)

REPORTING TO THE PROCURATOR FISCAL

21. We recommend that the obligation to prepare full police reports for submission to the procurator fiscal in every case be reviewed as it is not an effective use of police time. We believe there is scope for abbreviated reports to be prepared in a range of cases and note the recommendation in the ACPOS/COPFS joint protocol on police reports on this matter. We suggest that the use of abbreviated reports be kept under review by criminal justice boards to ensure that the most effective use is made of police and COPFS resources. (10.1 - 10.9)

22. We recommend that steps are taken to ensure that custody cases are dealt with earlier in the court day. We recommend that the police, procurators fiscal and courts work together closely to identify ways of speeding up the process - and that their joint efforts be monitored by local criminal justice boards. (10.15 - 10.20)

23. We recommend discussion between the Crown Office and Procurator Fiscal Service, COSLA and other specialist reporting agencies on what needs to be done to secure the consistently effective prosecution of environmental and other similar regulatory offences. (10.21)

ALTERNATIVES TO PROSECUTION

24. We recommend that alternatives to prosecution should be made more widely available, more flexible and more robust, to enable the courts to focus on more rapid handling of serious crimes and offences while giving

police and procurators fiscal the range of powers they need to respond quickly and appropriately to minor offences. (Ch. 11)

25. We recommend that the Executive considers increasing the scope of fiscal fines from £100 to either £200 or £500 - increasing the range of cases in which they could be used and bringing fiscal fine levels closer to that of court fines. (11.35 - 11.42)

26. We recommend that non-acceptance of a fiscal fine offer may be disclosed to a court in connection with any prosecution for the offence alleged, and also that acceptance of an offer may be disclosed to any court in connection with any other current or subsequent proceedings commencing within a period of not less than 2 and not more than 5 years. (11.11 - 11.17)

27. We recommend that information relating to fiscal fines accepted should be available to the police and fiscal so that their consideration of the action to be taken when someone re-offends can be taken in the light of all the facts. (11.16)

28. We recommend that, if fiscal fines are to be used more widely, difficulties relating to enforcing their payment should be addressed. (11.18 - 11.30)

29. We recommend that the calculation of time bar should be suspended for the period between the offer of a fiscal fine and notification as to whether the offer has been accepted or not. (11.26)

30. We recommend that, as with FPNs, it should be necessary for the person to whom an offer of a fiscal fine is issued to take positive action if he or she wishes to contest the allegation. In other words, to "opt-out" of the fixed penalty scheme or fiscal fine or compensation offer, he or she should be required to complete and return a form indicating that the fine is to be contested. (11.21 - 11.29)

31. We recommend that, as with FPNs, if the offender chooses to do nothing, the fiscal fine offer will become registered as a fine on the lapse of a fixed period. (11.21 - 11.29)

32. We recommend that, as with FPNs, all unpaid fiscal fines which are registered should be subject to a 50% increase. (11.21 - 11.29)

33. We recommend that a procurator fiscal should be able, in conjunction with or separate from a fiscal fine, to impose a compensation order on an alleged offender. We recommend that in parallel with s250 of the 1995 Act, the procurator fiscal should prefer a compensation order where an offender's means appear to be insufficient to pay both a fiscal fine and a fiscal compensation order. (11.43 - 11.57)

34. Guidelines on the use of compensation orders should be produced. The guidelines should, as far as possible, be publicly available. (11.56)

35. We recommend that both the courts and the procurator fiscal should be given power to make a compensation order where the victim of offending behaviour has been subjected to behaviour which is frightening, distressing, annoying or has caused nuisance or anxiety. (11.53 - 11.54)

36. We recommend that fiscal compensation orders should have no prescribed upper limit. (11.57)

37. We recommend that the arrangements for enforcement of fiscal compensation orders should be the same as for fiscal fines/FPNs. (11.55)

SAFEGUARD AGAINST OPT-OUT PROCEDURES

38. We recommend that a safeguard mechanism should be introduced to avoid injustice in relation to FPNs, fiscal fines and fiscal compensation orders where, for example, they have been wrongly issued or the person to whom one was issued was unaware of it having been issued and wished to contest it in court or to contend that no surcharge should be added for non-payment within the prescribed time. (11.25 - 11.27)

OTHER DIVERSION FROM PROSECUTION SCHEMES

39. We received very positive feedback from sentencers, procurators fiscal and social workers about the value of diversion schemes and recommend that effective schemes be made available nationally. We note, however, that little has been done to evaluate the costs and benefits of diversion schemes compared with other types of disposals. (11.58 - 11.60)

40. We recommend that steps should be taken to ensure that, where a scheme has proved to be successful, it is available consistently across the country. (11.58 - 11.60)

BETTER COMMUNICATION BETWEEN PROCURATORS FISCAL AND POLICE AT AN EARLY STAGE

41. We recommend that the police and COPFS should put in place arrangements for better communication and closer co-operation between them in relation to less serious cases. (Ch 12)

42. We recommend that the police and COPFS try out various different local arrangements for improved informal communication, to enable decisions to be taken as early as possible on whether and how a case should be taken forward and to improve standards of case preparation. An example of such an arrangement would be the location of a procurator fiscal in a main police station. (12.1 - 12.14)

43. We recommend that the Executive should pilot the co-location of police officers in COPFS offices. (12.15 - 12.16)

UNDERTAKINGS TO APPEAR IN COURT

44. We recommend that in the great majority of cases in which a summary prosecution is likely, the accused, if not detained in custody, should sign an undertaking to appear at a particular court on a particular date, and at a particular time. We recommend that this be introduced in phases. (Ch 13)

45. We recommend that the first phase should include, as a broad category, cases to be identified by Lord Advocate's guidelines, with a second phase encompassing all cases dealt with in police stations. (13.12)

46. We recommend that, as a third phase, consideration should be given to the introduction of a system of undertakings completed by police officers elsewhere than at a police station. (13.13)

47. We recommend that police officers be given access to slots in court diaries within the next 3-4 weeks to allow them to fix times suitable to the court for accused persons to appear on an undertaking. (13.4)

48. We recommend that where an accused has been released on an undertaking procurators fiscal should retain the option of determining that there should be an alternative disposal, such as diversion or fiscal fine, or no proceedings and, if so, should be able to cancel the requirement to appear. (13.5 - 13.7)

49. We recommend that it should be possible for the case to be continued for further investigation or for consideration of diversion or offer of fiscal fine on the strength of the undertaking without a complaint being served. (13.7)

ENCOURAGING EARLY PLEAS

50. We recommend that the prosecution should make available to the defence solicitor sufficient information to allow the latter to advise the accused of the strength of the case against him or her at an early stage of the process. Where the accused is unrepresented the material should be passed directly to him or her. (14.1 - 14.5)

51. We recommend that a summary of the evidence be provided to the accused along with the copy of the complaint. (14.1 - 14.5)

52. We recommend that defence solicitors should be properly remunerated for work done at an early stage of a case and be able to obtain reasonable remuneration for work for legally aided clients pleading guilty at this stage. (14.6 - 14.11)

53. We recommend that the summary criminal legal aid scheme should be amended to remove the current incentive to plead not guilty, to encourage the early resolution of cases and to discourage the maintenance of pleas of not guilty until relatively late in the proceedings in cases which the trial is not likely to proceed. (14.6 - 14.11)

54. We recommend that there should be an incentive in terms of a probable sentence discount to encourage early pleas of guilty. (14.12 - 14.21)

55. We recommend that in the generality of cases a court should not allow any discount of sentence for a plea on the day of the trial or during the trial. (14.12 - 14.21)

56. We recommend that, as far as summary cases are concerned, section 196(1) of the 1995 Act, which enables sentencers to take into account the stage at which a guilty plea is tendered in considering the award of a sentence discount, should be amended by changing "may" to "shall". (14.12 - 14.17)

57. We recommend that sentencers be required to state in court whether they have given a sentence discount and the amount of that discount and that the court should be required to minute that. (14.18)

58. We recommend that where a sentencer does not give a discount, that fact should also be stated in court along with the reasons for allowing no discount and that the court should be required to minute that. (14.18)

59. We do not recommend at this stage that there should be a prescriptive scheme with detailed guidance as to levels of discount. (14.19 - 14.21)

ELECTRONIC COMPLAINTS

60. We recommend that the principal copy of the complaint, minutes and the like should be the electronic version, on the assumption that technical and security issues can be satisfactorily resolved. (Ch. 15)

61. We recommend that copies of complaints, minutes, etc. which are printed out should be regarded as copies for use by the court, the accused or the Crown. (Ch. 15)

62. We recommend that an accused or his or her solicitor should be able to inspect the electronic originals of such documents as of right. (Ch. 15)

DEALING WITH MULTIPLE CASES AGAINST AN ACCUSED

63. We recommend that, where possible, all outstanding complaints against an accused should be dealt with in the same court, in most cases preferably the court in whose jurisdiction the accused lives. (Ch. 16)

64. We recommend that when there are cases outstanding against the same accused the Crown or the defence should be able to apply to have cases transferred to or from a particular court so as to bring the outstanding cases together in the same court. (16.1 - 16.6)

65. We recommend that the court should have power to direct such transfers at its own hand, having heard the Crown and, if present, the defence. (16.7)

66. We recommend that the court should have power, on Crown, defence or joint motion, to conjoin complaints and direct that they be treated as one for the purposes of trial. (16.9 - 16.10)

67. We recommend that for the purposes of sentence each complaint be dealt with separately and should remain subject to its own maximum. (16.11)

68. We recommend that the law be changed to enable all previous convictions to be taken into account irrespective of whether the offences were committed prior to or subsequent to the offence under consideration. (16.14)

69. We recommend that where cases are transferred from one court to another the transfer should be carried out electronically; it should not be necessary to complete the physical transfer of hard copy documents before the receiving court can start dealing with the case. (16.8)

DISCLOSURE OF PREVIOUS CONVICTIONS PRIOR TO CONVICTION

70. We recommend that section 101(3) of the 1995 Act should be amended in respect of summary cases to allow all charges arising out of the same incident or on the same occasion to be included on the same complaint and to go to trial at the same time, even though one or more of the charges discloses a previous conviction. (Ch. 17)

PRIORITISATION OF CASES

71. We do not have any general recommendation to make as to the prioritisation of some types of case over others. (Ch. 18)

72. We recommend that prioritisation should remain the responsibility of COPFS. (Ch. 18)

73. We recommend that efforts to speed up the system as a whole should take precedence over prioritisation of some types of case and over the introduction of further specialised courts. (Ch. 18)

CITING WITNESSES

74. We recommend that the operation of the new protocols for ACPOS/Crown handling of witness citation should be carefully monitored to establish whether they deliver timely and efficient witness citation. (19.1 - 19.9)

75. We recommend that detailed consideration be given by COPFS, in liaison with the police, to establishing a national centralised system (though not necessarily a national agency) for the citation and countermanding of witnesses, making best use of IT. (19.10)

76. We recommend that when a trial is adjourned witnesses present at the trial should be re-cited for the adjourned trial before they leave the court, leaving only those who did not attend to be re-cited formally by post or in person. (19.11 - 19.12)

77. We recommend that the police routinely obtain the home and work address, the home, work and mobile telephone numbers and home and work e-mail addresses of either accused or witnesses so far as that person has such means of contact, for the purpose of providing information and countermanding witnesses. (19.14)

78. We recommend that, provided a satisfactory system of proof of receipt is put in place, it should be competent to cite a witness by e-mail, where an e-mail address has been provided. (19.13)

79. We recommend that legislation should provide that failure to comply with a reasonable request by a police officer for citation details should become an offence. (19.15)

INTERMEDIATE DIETS

80. We recommend that intermediate diets should continue, that they should be made more effective and that judges should receive additional training in the management of them. (Ch. 20)

81. We recommend that section 148(2) of the 1995 Act be amended so that there is not a presumption that a trial will be adjourned. (20.14)

82. We recommend that section 148(4) of the 1995 Act be amended so that the bench may ask any questions relevant to the identification of the issues which will be in contention at the trial with a view to minimising the number of witnesses required to attend the trial. (20.15 - 20.16)

83. We recommend that either party should be given the right to challenge the refusal of the other party to accept the evidence of a witness as non-contentious and seek a court direction on the matter. (20.23 - 20.29)

84. We recommend that in such circumstances, if the evidence of a witness appears to the court to be non-contentious and if the signed statement of that witness provided to the court appears to cover all material issues to which that witness is likely to be able to speak, the court may, having heard both parties, direct that that statement shall be admissible evidence in the case without the witness having to speak to it. (20.26 - 20.27)

85. We recommend that where such a direction has been made, the party who did not accept that the evidence was non-contentious may cite the witness to the trial. (20.28)

86. We recommend that in such circumstances, both the statement of the witness and his or her oral evidence should be admissible evidence at trial. (20.29)

87. We recommend that at the intermediate diet the court should seek confirmation that the accused has been made aware that a sentence discount is likely to be available for a plea of guilty at that stage but is unlikely to be available at the trial. (20.34)

88. We recommend that statutory and common law special defences should be intimated no later than the intermediate diet or any adjournment of that diet. (20.21)

89. We recommend that not more than about 30 intermediate diets should be set per part court day. (20.4)

WITNESS STATEMENTS

90. We recommend that for all cases in which a summary trial has been fixed full signed witness statements should be prepared by the police. (21.1 - 21.3)

91. We recommend that section 258 of the 1995 Act be clarified to confirm that the Crown and the defence may serve a statement (of the kind referred to in that section) relating to the signed witness statements of witnesses whose evidence is considered unlikely to be disputed and that unchallenged witness statements should be the evidence of the witnesses concerned. (21.4)

92. We recommend that similar provision be made to deal with other types of non-contentious evidence; for example, the provisions for routine evidence in sections 280 and 281 of the 1995 Act. (21.5 - 21.11)

93. We recommend that the time limits in sections 258, 280, 281, etc. for the service of a notice of uncontroversial evidence or routine evidence of 14 days before trial be changed to 7 days before the intermediate diet where the accused is in custody and 14 days where he or she is not. (21.10)

94. We recommend that conditions be prescribed which, if satisfied, would make a signed witness statement potentially admissible in evidence. (21.5 - 21.11)

95. We recommend that a statement made by a witness to a police officer which is recorded verbatim and read over to the witness and signed by him or her should be admissible in court without being spoken to by a witness where it is agreed between the parties that the statement shall be the evidence of that witness, where such a statement has not been challenged under section 258 procedure revised as proposed, or where, having heard both parties, the court has directed at the intermediate diet that the statement shall be admissible evidence in the case. Such statements should be read aloud to the court in the course of a trial as admissible evidence of the facts to which the witness attests. (21.5 - 21.11)

PRODUCTIONS FOR SUMMARY CRIMINAL CASES

96. We recommend that the need for the police to retain productions with a view to trial should be reviewed with the aims of clarifying the law, e.g. by legislative change or the provision of guidelines, and reducing the amount and types of property which it is necessary to retain for possible production at a trial. (Ch. 22)

EVIDENCE OBTAINED USING VIDEO TECHNOLOGY

97. We recommend that video recordings of the process of cautioning and charging suspects should be regarded as routine evidence. (Ch. 23)

98. We recommend that, where there is CCTV evidence or other recorded evidence of events as they happened, it should be made possible to lead that evidence without it being necessary for a witness responsible for making, monitoring or obtaining the recording to attend court to speak to it, such as a police officer or a CCTV operator. A letter or certificate from the relevant organisation as to the provenance of the evidence should suffice. (Ch. 23)

99. We recommend that video evidence of witness statements should be treated in the same way as signed witness statements in relation to the procedure for such evidence to be agreed as uncontroversial. Where such evidence is either agreed to be uncontroversial or the court so directs it should be admissible evidence in the case. The Crown or the defence should be able to use that evidence without it being necessary for one or more witnesses to speak to it. (Ch. 23)

TRIAL COURTS

100. We recommend that individual courts experiment with different court programmes to see what works best in that court to achieve optimum efficiency. Optimum efficiency must take account of the needs of all court users, including victims and witnesses. (Ch. 24)

101. We recommend that there should be no call-over of trials (i.e. to determine whether the accused and witnesses are present and whether the trial will proceed) after the time when the first trial is due to start and that there should be no adjournments after that time to discuss pleas in cases in which the trial has not commenced. If there is to be a call-over, the court should sit earlier for that purpose. (24.2 - 24.4)

102. We recommend that the first trial should start when it is due to start and that the court should refuse all adjournments except of trials which cannot, in the interests of justice, commence at all. (24.3)

103. We recommend that courts be given targets for the time which elapses between the time when both

accused and witnesses are required to arrive at court and the time at which the case in which accused are involved commences and, in the cases of witnesses, the time when the witness gives evidence. We recommend that courts should aim to require the attendance of witnesses at court no more than an hour or so on average before they are required to give evidence. (24.5 - 24.7)

TRIAL IN ABSENCE

104. We recommend that trial in absence should be competent whether the accused has been charged with a common law crime or a statutory offence and whether or not the crime or statutory offence is punishable by imprisonment. (Ch. 25)

105. We recommend that trial in absence should only take place if the court is satisfied that the accused has received notice that he or she is required to attend trial at a particular time and that if he or she fails to do so the trial may or will proceed in absence. (25.1 - 25.7)

106. We recommend that trial in absence should be competent where any counsel or solicitor instructed in the case withdraws. (25.9 - 25.11)

107. We recommend that the court should not be required to appoint a solicitor when the accused is unrepresented but should have power to do so. (25.9 - 25.11)

108. We recommend that it should be made competent to establish the identity of an offender by photographic evidence where identity is in issue. (25.12 - 25.13)

109. We recommend that following trial in absence, a court should have power to impose fines, and make compensation orders, supervised attendance orders instead of fines, exclusion orders (from licensed premises) and non-harassment orders. (25.14 - 25.15)

110. We recommend that it should not be competent to impose sentences of imprisonment or sentences which require the consent of the accused in the absence of the accused. (25.16 - 25.17)

111. We recommend that a provision be introduced in Scotland along the same lines as section 142 of the Magistrates' Act 1980 in England and Wales, which provides that the court may vary or rescind a sentence or other order made when dealing with an offender and may order a rehearing of the case if it appears to the court to be in the interests of justice to do so. (25.18 - 25.19)

THE ROLE OF THE BENCH IN MANAGING COURT BUSINESS

112. We recommend that the Judicial Studies Committee provide further training for judges in the management of summary court business. (26.16 - 26.17)

113. We recommend that management information should be provided to judges on a court by court basis at regular intervals showing the extent to which there is deviation from the mean in relation to the number of adjournments granted at the various states of the process, the overall time taken to deal with cases and the implications for witnesses, victims and accused. (26.13 - 26.15)

ALTERATION OF DIETS

114. We recommend that consideration should be given to repealing or amending section 137(2) of the 1995 Act (requirement on the court to postpone a case on the joint application of the prosecutor and accused unless there has been unnecessary delay on the part of one or more of the parties). If it is thought necessary to retain that sub-section it could be amended to specify that applications for postponement of a case should state in cogent terms the reasons why postponement is sought. (Ch 27)

SENTENCING INFORMATION SYSTEM

115. We consider that a sentencing information system would have benefits in furthering consistency in sentencing and reducing the phenomenon of "sheriff shopping", thereby encouraging more early pleas. We recommend that this issue be examined further by the Sentencing Commission. (Ch 28)

116. We suggest that a sentencing information system for summary courts could use, so far as possible, the software developed for the current High Court system. We suggest that the software be modified so that access can be made available to COPFS and to defence lawyers. They should be able to gain access to all the data other than the identity of the judge who dealt with a particular case. (Ch. 28)

SOCIAL ENQUIRY REPORTS

117. We recommend the removal of the compulsion upon the court to obtain a new Social Enquiry Report (SER) prior to sentence in the circumstances currently prescribed, where a report which has been produced in the last 3 months is available. The option of obtaining a new report in these circumstances should be retained. (29.1 - 29.4)

118. We recommend that social workers be provided with a short summary of the evidence against an accused (similar to that which would be provided to the accused with the complaint) along with a copy of the complaint and details of the accused's previous convictions to assist in the production of accurate SERs. (29.6)

119. We recommend that it should not be necessary for a court to obtain a social enquiry report if the court is satisfied that, having regard to the sentence likely to be imposed by it, the obtaining of such a report would serve no useful purpose. (29.1 - 29.4)

COURT SITTING HOURS

120. We do not make any recommendation for the regular extension of court hours. (Ch. 30)

121. We recommend that courts should have responsibility for making the best use of the resources available to them. In doing so they should consider adjusting their hours of sitting to suit local circumstances. This is a matter which local criminal justice boards may wish to consider in more detail. (Ch. 30)

SUMMARY APPEAL COURT

122. We recommend that there should be a summary criminal appeal court. (Ch. 31)

123. We recommend that the summary appeal court should hear all summary appeals against sentence. Provision should be made for the summary criminal appeal court to refer any appeals which raised questions of law or of sentencing principle of wider application to the High Court of Justiciary. (31.12)

124. We recommend all appeals involving conviction or acquittal or lenient sentence should continue to be marked to the High Court of Justiciary. It should be open to judges of the High Court carrying out a sift of such cases to direct that the case be dealt with by the summary criminal appeal court. (31.13 - 31.16)

125. We recommend that the summary criminal appeal court hearing sentence only appeals, in which leave has been granted, should sit as a bench of two but, in the event of disagreement or where a point of importance arises, should sit as a bench of three. (31.16 & 31.19)

126. We recommend that the judges for the summary appeal court should be drawn from the shrieval bench. We envisage sheriffs principal being part-time members of the court. We also envisage that a number of experienced sheriffs would be appointed as part-time members of the court for a term of years, possibly 3 years, which might be renewed. Such sheriffs should have held office as such for a minimum period of years, possibly 5 years, prior to their appointment as members of the summary criminal appeal court.

127. We recommend that overall responsibility for the operation of the summary appeal court should be in the hands of a single sheriff principal, who would be appointed to that role on a part-time basis for a term of years, possibly 3 years, and that this appointment could rotate between sheriffs principal. (31.9 - 31.11)

128. We recommend that the summary appeal court should be peripatetic. Appellants could be represented by their own solicitors in a relatively local court. (31.17 - 31.18)

129. We recommend that provision should be made for the Scottish Legal Aid Board (SLAB) to scrutinise the merits of summary appeals before legal aid is granted for them. (31.21 - 31.22)

FINE ENFORCEMENT

130. We recommend that the Executive should take responsibility for fine enforcement away from individual courts and bring it together within a single delivery organisation - which could be a separate arm of the Scottish Court Service or a free-standing public sector organisation. (Ch. 32)

131. Wherever practicable, financial penalties which carry an ultimate criminal sanction, should be collected and enforced by the new agency, which would have a variety of new powers. (Ch. 32 - 32.46 in particular)

132. We recommend that the Executive should explore with the Department of Work and Pensions the options for making the deduction from benefits scheme operate more effectively in Scotland. (32.47 - 32.48)

133. We recommend that the Executive should consider how arrestment of earnings orders might be better used as a means of fine enforcement. (32.49)

134. We recommend that a thorough examination of the unit fines system should be undertaken in the context of the revised approach to Summary Justice proposed in Scotland. (32.50)

HOW WILL WE KNOW WHETHER THE CHANGES WE RECOMMEND ARE WORKING?

135. We recommend that more information be collected about the time taken to handle not just those cases in which there is a prosecution but different populations of cases - for example, those in which warnings are issued, fixed penalties and fiscal fines are offered, and cases marked "no proceedings". (33.1 - 33.13)

136. In relation to cases diverted from prosecution, we recommend that the National Criminal Justice Board should consider what further information needs to be collected in order that sensible time targets can be set. (33.14)

137. We recommend that the National Criminal Justice Board should seek to identify quality controls and targets which in combination will help to eliminate those factors which this report identifies as leading to wasted effort on the part of one or more agencies. (33.15 - 33.18)

138. We recommend that there should be a clear process within the system for determining the most relevant performance information and for generating it on an area by area and/or a court by court basis. This should be an easily comprehensible system capable of benchmarking between areas and susceptible to trend analysis. (33.19 - 33.23)

139. We recommend that the working up of detailed system targets should be the responsibility of the National Criminal Justice Board. (33.24 - 33.27)

140. We recommend that there should be regular thematic cross-agency inspections of critical elements of the criminal justice system. (33.28 - 33.30)

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Appendix 2.

26 April 2004

The Summary Justice Review Committee: REPORT TO MINISTERS

Annex A: NOTE OF DISSENT

Sheriff Brian A Lockhart Mrs Helen G Murray JP

INTRODUCTION

1. We support the principle of the unification of the summary criminal court system. By that we mean that all courts should be funded by the Scottish Executive and administered by the Scottish Court Service. We agree with the conclusion that sheriffs should continue to hear summary criminal business, but we do not agree with the introduction of the proposed summary sheriffs to replace lay justices. We suggest that there is a place for lay justices in our summary criminal justice system and dissent from the proposition that lay justice should be abolished.

2. We think that the onus is on those recommending the abolition of lay justice to demonstrate that it is intrinsically undesirable and unworkable in the overall context of the unified summary court system, centrally administered, which the Report proposes and which we support.

3. Our arguments, set out below, are based on what we see as the inherent desirability of retaining the role of the lay justiciary in dealing with less serious crimes, and the absence of concrete evidence that moving to an all professional judiciary will significantly improve the delivery of justice in such cases.

4. We would not argue that lay justice as it operates is perfect and we set out below our proposals for improvement. Nor are we arguing that lay justice is better because it is cheaper to provide and therefore more efficient. The costing evidence from the main Report reveals some difficulty in costing accurately the total cost to society of the way in which summary justice, lay or professional, is provided. While we consider that greater efficiency and cost effectiveness could be achieved by making fuller use of lay justices with the enhanced powers and disposals we suggest below, our arguments are not based on saving money. We recognise and develop in more detail the arguments for greater investment in quality lay justice, particularly in respect of recruitment and training. These will have resource implications.

5. We therefore invite Ministers to consider the following questions:

- Is lay involvement in the dispensing of summary justice desirable in principle? and
- Is it possible and cost effective to improve the delivery of lay justice to fit in with a new unified system and to safeguard and enhance its credibility?

6. Only if Ministers conclude that the answer to both these questions is "no", we submit, should they decide that the correct way ahead is to move to a fully professional summary justice system.

ARGUMENTS FOR LAY JUSTICE

Community Participation

7. Lay justice is a powerful expression of community participation in the regulation of society. It seems inconsistent to retain it in the most serious cases - in which completely untrained juries make key decisions on the evidence - but to remove it in the context of summary justice.

8. Reflecting the views of Lord Justice Auld on English and Welsh magistrates, Scottish justices "have an important symbolic effect of lay participation in the criminal justice system which should not be undervalued".

The existence of citizens across the country, with a practical understanding of what the law is and how it works, is of great importance in a democracy.

9. That lay justice is not found in other parts of the world, apart from England and Wales, ignores the fact that lay involvement depends on the cultural and political tradition of a country. The role of Scottish justices of the peace has evolved over a period of 400 years and is capable of further evolution.

The nature of the lay judiciary

10. Arguments in favour of lay justice which have been put to the Committee include:

- the importance of community links and community awareness which Justices of the Peace enjoy;
- the proposition that the lay bench represents the community it serves;
- the capacity of non-professionals to reach a balanced judgement on their peers;
- the fact that justices are volunteers who are less vulnerable to case-hardening.

11. Justices to whom the Committee spoke felt strongly that they had a good understanding of the issues which affected the community within which they were delivering justice. We recognise that strength.

12. The main report quotes figures on the composition of the lay justiciary which suggest that it is not fully representative of the Scottish population. We would, however, observe that the figures in the main Report refer to all justices. In practice, however, in 2001-02 of the 3790 serving justices in Scotland, 1806 were "signing justices" and 1984 full justices, of whom only 729 were needed for court duties. There appear to be no available statistics showing an analysis of those who sit on the bench, nor any evidence that they represent a narrow part of the community, since no information on the social status, age or gender of bench - serving justices is collected.

13. We acknowledge that in the past the process of identifying candidates to become a JP has in some cases tended to produce a bench much in the image of the one which preceded it, rather than improving the representative nature of the bench with each succeeding generation of JPs. Nevertheless, they do reflect, not perfectly and with room for improvement, the mix of the community from which they are drawn. Improvements are already happening. In the last 20 years, there has been a move in a number of areas towards a more open system of recruitment where nominations come from the local community and there is a structured and robust selection thereafter. In addition, changes are in immediate prospect in the process of appointing members of Justice of the Peace Advisory Committees (JPACs) - critical to the process, since they recommend candidates for JP office to Ministers. The changes, essential to bring JPACs into line with public appointments procedures, will make appointments to them more open and bring an element of external accreditation to the recruitment process.

14. Looking at recent appointments alone does suggest that change is happening, albeit perhaps slowly. For example, the Scottish Ministers appointed 60 Justices in 2001-02 of whom 24 (40%) were female. Two came from ethnic minority groups. We recognise the arguments for keeping information on social, occupational and ethnic origins of JPs. We think that, building on the improvements already made, it will be possible to make the composition of sitting Justices broader and more consistent with the range of social and ethnic backgrounds in the Scottish community and therefore give better expression to the principle - which we firmly support - of involving community members in the delivery of justice. However, these comments must be seen in light of the overarching principle of judicial appointments which must be that the best candidates are appointed.

15. We are not opposed to the proposal in the main Report that thought should be given to giving local communities and individuals scope in other ways to make their views felt in the criminal justice system. A local criminal justice forum - perhaps a consultative group of lay persons feeding into the local criminal justice boards recommended by the Normand Report and now being piloted - may well be an excellent idea. We would submit that it is no substitute for direct involvement of lay people in dealing with less serious offences which have a real impact on community wellbeing.

The capacity of lay justices to perform their judicial role

16. We see no reason why lay justices should not properly fulfil the judicial role. We saw evidence of this on our visits to district courts.

17. A judge in the summary criminal court is concerned with sentencing, assessing evidence in trials, regulating proceedings and controlling conduct in court. These activities are governed by legal rules, which define the area of discretion within which the judge has to work. Lay justices must understand the legal framework within which the court operates and the procedures to be followed. This knowledge can be gained through appropriate judicial training. On points of law and evidence they have the advice of legally qualified clerks.

18. The key qualities required of a judge, however, include the ability to follow a reasoned argument, think logically, act with confidence and fairness and make decisions. The possession of these qualities depends on personal characteristics and experience of life. Individuals from a range of backgrounds have many, sometimes all, of these qualities and therefore could become good judges.

19. As Lord Thomson said in his foreword to the booklet "What Scots Magistrates Should Know":

"A few lucky people may be born judges but most of them have to learn to be judges the hard way. Being a judge is just a job like any other job. You have to work at it and learn how to do it."

Sound training is needed at all levels, even for the born judge, because the public is entitled to demand the very highest standards from all, lay and professional.

20. We note that some individuals and groups argue strongly in favour of a fully professional judiciary, including the majority of professionals who earn their livings in courts. They base part of their argument on the grounds of greater consistency on the part of professionals, but no objective evidence for this has been produced.

WILL ABOLISHING LAY JUSTICE HELP TO SOLVE THE CURRENT ISSUES IN THE SUMMARY JUSTICE SYSTE?

21. The evidence gathered by the Committee, and the responses to the First Order Consultation, identified major issues in the summary criminal justice system to be:

(a) The time taken for the police to report cases to the procurator fiscal;

(b) The time taken to get cases started in court;

(c) The time taken for cases to reach a conclusion in court;

(d) Procurator fiscal service under-funded and under-staffed;

(e) Lack of disclosure of information by the Crown to the defence which would allow early resolution of cases;

(f) Lack of preparation of cases for whatever reason by both prosecution and defence leading to abortive intermediate and trial diets;

(g) The manner in which legal aid operates in that solicitors who plead guilty at an early date for their clients are not adequately remunerated;

(h) Too many late pleas;

(i) Ineffective citation of witnesses;

(j) Delays in enforcement of warrants;

(k) No apparent system of discounting for early pleas;

(l) Delays in breach proceedings in respect of non-custodial disposals;

(m) Key personnel in the criminal justice system not doing what they were meant to do when they were required to do it.

22. Where possible, these issues have had the attention of the Committee. It is noteworthy that, since the evidence was gathered, some of the issues have already been addressed. Very considerable additional resources have been made available to the Crown Office and Procurator Fiscal Service; police reporting targets have been set; a new system of citation of witnesses was introduced by Crown Office, with new target times of citation for fiscals and the police; there has been a High Court decision on sentence discounting; a committee has been set up to address delays in breach proceedings in respect of non-custodial sentences.

23. As the list above indicates, the key concern of the Committee was to eliminate delays and inefficiencies in the system, ensuring that summary justice could be delivered more speedily. We are not convinced that the abolition of lay justice would contribute to this goal. The evidence in the main report for slower justice in lay courts is English, and not based on Scottish experience. In the same research paper Professor Morgan also

notes that factors other than the identity of the judiciary - for example, waiting times - significantly influenced overall court efficiency.

24. There is no evidence of a groundswell of public dissatisfaction with the current judges in the summary system. It is certainly not clear that the abolition of lay justice would resolve the above issues.

The advantage of a lay court

25. The sheriff court at present struggles to deal with its caseload. Problems of efficient dispatch of business will increase as a result of the Bonomy proposals to increase the solemn jurisdiction in the sheriff court from three to five years. As is noted in the main report, there is a need to move criminal case work downward throughout the system to relieve increasing pressure on the solemn courts.

26. The existence of a lay court running parallel to the sheriff court would allow less serious cases to be dealt with expeditiously rather than competing for priority, as in the present overstretched sheriff court. There various cases are said to be "priority" perhaps because the accused is in custody, because of the nature of the case, or the identity of certain witnesses. These priority cases preclude the hearing of what are seen as "non-priority cases". We recognise that every case is important to the persons involved and it is wrong that, because a case is seen as "non-priority" that those involved should have to wait for justice. The district court is a major resource, currently underused, which could absorb more business and take the pressure off the sheriff court.

Reduction in court business

27. While we fully support the principle that cases should where appropriate be diverted from prosecution, we are sceptical about the assumption in the main report about the number of cases overall that could be diverted from the courts altogether by way of a fine, thus greatly reducing the volume of business at the lower end.

28. It is the duty of the police to investigate crime. It is the duty of the Crown to prosecute crime. It is the duty of the judges in summary courts to determine guilt and impose sentence. We consider that great care should be taken before vesting substantial extra powers in the police or the Crown. Police should only be empowered to impose fines by way of Fixed Penalty Notice in well defined and minor circumstances. In acknowledging the success of fiscal fines to date, we should be slow to give to the Crown a major sentencing role in addition to that of independent prosecutor.

29. Many of the alternatives to prosecution are appropriate only to first offenders or offenders with minor records not charged in conjunction with anything more serious. We understand that this point was made, for instance, when new police FPNs for road traffic offences were introduced in mid-2003. It would not be appropriate for police to give a fixed penalty notice to someone who has a substantial criminal record or a number of outstanding fines. It is understood that records will be kept at the Scottish Criminal Records Office of fines recorded against any individual. Where there are a number of outstanding fines, there should be a prosecution. Many offenders need support and advice in the community, not more fines which they cannot pay. Courts are in a position to provide these services through the various non-custodial sentences now available.

30. Discussions with procurator fiscal suggest reluctance to impose fines at levels much higher than those presently available, so we query the scope for increased diversion from increasing the fiscal fine limit. We also see limited scope for fiscal compensation orders. There is the question of fairness. Is it right that someone with means could escape prosecution and a criminal record by paying a large amount of compensation, while someone who cannot pay is prosecuted? We agree with the views of consultees that fiscal compensation is not appropriate for physical injury and suggest that not all offences involving damage to property are suitable for diversion. In many cases, the damage forms only a small part of the criminal conduct cited in the complaint and/or the accused has such a substantial criminal record that diversion would not be seen to be appropriate.

31. We note the proposals in the main report that persons who are sent an offer of a fiscal fine or fiscal compensation order and do not respond will have a fine or order registered against them without conclusive proof that they have received the offer. The Stewart Committee was concerned about the "concept of deeming guilt by silence". We share that concern. If an offer is not accepted, there should be prosecution.

32. Courts are also required to deal with instances where diversion is challenged. Such challenges may increase as a result of fiscal fines and fixed penalty notices being enforced as fines (and not civil debts) and the proposal that they be referred to in subsequent proceedings. Future proposals for fine enforcement, we consider, will need to retain a role for the court in the interests both of justice and of credibility. We therefore feel that there will continue to be a substantial role for judges who deal with the less serious offences in summary business - lay justices.

THE RIGHT APPROACH

33. In short, we suggest that the right approach here is that taken by Lord Justice Auld in his recent monumental review of criminal procedure in England and Wales: to explore;

"Whether there is a clear need for change and if so, what change might be feasible and sufficiently worthwhile to justify the disturbance of well established structures and procedures."

34. Lay justice has a long history, and, in our view, there is no objective evidence before the Committee that overall it has failed to deliver justice to those accused who have come before lay courts. In our visits to district courts around Scotland, we have seen a variety of practice, some better than others, but we do not think that we have seen justice denied through the use of lay justice. The continuation of lay justice is supported not only by those who responded to our own first order consultation (responses to which were, we accept, dominated by those involved in or representing lay justice) but also by respondents to the public survey. As the main Report records, 60% of those responding to this public survey thought the use of lay magistrates should be continued, with 26% preferring a wholly professional system. 59% thought that both lay and professional judges were consistent in the way they deal with cases. 64% thought both were impartial and not prone to prejudice.

35. Interestingly, recent support has come from the highest level of the judicial system - in the form of *dicta* in the High Court of Justiciary and the Judicial Committee of the Privy Council in the case of *Clark v. Kelly*, which related to the role of the legal assessor in the district courts. In the Judicial Committee of the Privy Council in 2003 Lord Rodger of Earlsferry, a former Lord Justice General, said:

"District Courts have operated since 1975 when they replaced the old system of Burgh Courts and Justices of the Peace courts. During that time they have increasingly gained the confidence of the public, the legal profession and the High Court of Justiciary."

36. In this context we therefore invite Ministers to consider carefully, before abolishing lay justice, whether they are convinced that abolition will produce an improvement in the justice delivered to those accused of less serious offences.

LAY JUSTICE IN PRACTICE: THE CURRENT DISTRICT COURTS

37. As the discussion above highlights, however, we do agree that if lay justice is to be retained, improvement must be made in a number of key areas:

- consistency of support and management;
- recruitment;
- training; and
- the court estate.

38. We would argue that any difficulties can be overcome through structured change and proper investment, producing a more confident and representative bench, delivering consistent justice across Scotland.

39. Before looking at this in detail, it may be helpful to note the context in which the district courts currently operate.

40. It is the statutory duty of local authorities to manage the district courts. Each local authority decides for itself what building or other facilities to provide and how to prioritise the provision and upkeep of such facilities alongside its other estate management responsibilities. Each also decides on the priority to be given to the training of justices, the provision of clerks, and the services of administration staff.

41. There is a variation in the standard of provision across the country. Some authorities are very generous and give great encouragement to lay justices by providing the highest standard of services for them and other court users, including the local fiscals, defence agents, police, court staff and, very importantly, members of the public. Some authorities, on the other hand, appear to have difficulty with this approach.

42. This variation contributes to the variation in quality of services to the court. It particularly affects the training of justices at both local and national level. If not properly funded, training cannot be properly provided. Clerks need to be trained too, not just in their court role but also in how to train and support their justices. Without adequate training it is difficult to attain a high standard of performance in court. It must be emphasised, however, that despite the difficulties in some commission areas, the quality of lay justice can be very high. With central administration, direction and funding and a uniform approach to the needs of all court users, the general performance of everyone involved can be improved.

43. Funding from central to local government includes an element for the provision of the district court with unhypothecated revenue support grant, but this is not ring-fenced and it is up to each local authority to decide

where to target its resources. They receive no central funding specifically for recruitment and training.

A unified court system administered by the Scottish Court Service

44. We feel strongly that the first key step in improving lay justice is to implement the Committee's unanimous recommendation for a unified court system. Justice is a national service and, while we support fully lay involvement in delivery, we do not see that as equating to licence for local variations in provision of estate, practice and management which are unjustified in terms of efficiency and effectiveness. In particular we note the response of the Central Advisory Committee on Justices of the Peace to the first order consultation where they said:

"The Committee expressed concern that local authority administration of the district courts could lead to variations in funding, estate and training. It was felt that there was a case for bringing the administration of all criminal courts under the co-ordination of the Scottish Court Service."

These sentiments received support from representatives of the District Courts Association and clerks of court and also from justices to whom we spoke.

45. We recognise the contribution made over the years by the District Courts Association to give guidance, information and training to justices. Despite limited resources, it has run regular weekend training courses, disseminated information through its newsletters, produced good practice guidelines, a district court charter and a manual on signing duties. Of particular significance, it has developed a training programme based on standard national competencies. Its expertise could be of great value in implementing the new system.

PROPOSALS FOR THE STRUCTURE OF THE SUMMARY JUSTICE SYSTEM

46. We recognise that we must demonstrate how we think a retained lay judiciary would work in the context of a unified court system.

47. We propose that within the new unified court system, administered by the Scottish Court Service, there should be two divisions - the sheriff court division, dealing with more substantial and serious criminal business, and the district court division, dealing with less serious business. These divisions would be run by the Scottish Court Service but would operate separately. The sheriffs principal would have a statutory duty to secure the speedy and efficient disposal of all summary criminal business within their sheriffdoms. They would be assisted by local Criminal Justice Boards set up on the lines recommended in the Normand Report and now being piloted.

48. The sheriff court division would have power to impose custodial sentences of up to 12 months, fines of up to £20,000 and all the current non-custodial disposals available to them. The district court division would have power to impose custodial sentences of up to 3 months, power to disqualify from driving (we recognise that extending power to disqualify beyond "totting up" offences may be a reserved matter under Road Traffic legislation) and power to impose fines of up to £5,000. Facilities should be available in all areas to allow the imposition not only of Probation Orders, but also of Community Service Orders, Supervised Attendance Orders, and Restriction of Liberty Orders. Although cases requiring imposition of a Drug Testing and Treatment Order, which are very resource-intensive and designed for significant and regular offenders, would probably be taken in the sheriff court, consideration should be given when the new regime has settled down as to whether resources can be made available to allow this disposal to be available in the district court division.

49. We consider that the availability of additional disposals in the district court would enable a significant number of cases currently prosecuted in the sheriff court to be dealt with in the district court division.

50. As at present, all decisions about allocating cases between the two divisions would be taken by the procurator fiscal. There should be no statutory provision dictating the criteria for allocation of cases between the two divisions, but guidance should be produced for procurators fiscal from Crown Office.

51. We would expect that normally less serious summary cases would be allocated to the district court division, where custodial sentences would not normally be anticipated in the first instance. However, power to impose a custodial sentence of up to 3 months should be available if required, for example in dealing with repeat offenders. In particular, the court should be able to impose a custodial sentence if an offender defaulted on a Probation Order, a Community Service Order, a Supervised Attendance Order or a Restriction of Liberty Order.

52. Cases for prosecution in the district court division would not, however, be expected to include any case, however minor, involving any new or complex issues of law or any serious matter of public interest, or any case expected to be particularly lengthy.

53. On the basis of the sentencing range suggested and as a result of increased range of disposals being made

available, in particular the power to disqualify from driving, the district court division would be able to deal with a significant number of lower end cases currently prosecuted in the sheriff court. This would free up capacity in the sheriff court division to allow sheriffs to deal with more serious cases. Special courts, such as Drug Courts, Youth Courts and possibly in the future Domestic Violence Courts should be in the sheriff court division. There should be a facility to transfer cases from the district court division to the sheriff court division to facilitate a rolling up of cases where appropriate.

54. A court in the sheriff court division would be presided over by a sheriff sitting alone and a court in the district court division by a lay justice who would sit with a legally qualified clerk. We do not see a continuing role for stipendiary magistrates in the district court division and would not therefore envisage those currently in post being replaced when they retire. However, pressure of work in Glasgow may render this necessary.

55. We do not think it is necessary for lay justices to sit in threes, given the jurisdiction suggested. The greater number of lay justices at present sit singly with a legally qualified clerk and are keen to continue to do so. Moving longer and more serious cases from the sheriff court may well result in more part-heard trials with a requirement to reconvene the court at a later date, and is likely to result in more cases having to be adjourned for reports prior to sentence. The difficulties in getting a bench of three together on an adjourned date might complicate matters and cause delays. If there is concern about justices operating singly, we are confident that this can be met through more comprehensive nationally organised and funded training to improve their skills.

56. The view has been expressed that sitting in threes produces a more confident bench which makes more consistent decisions, but no evidence was produced in support of this view. It is certainly not apparent in the Scottish Borders commission area where three benches sit singly and one sits in threes. We have observed that the move from a triple to single bench in West Lothian led to a more effective and efficient court, where justices were carefully selected and well trained.

57. We accordingly see distinct and separate roles for sheriffs and lay justices in the future summary criminal justice system. We consider the sentencing powers which we propose for the two separate divisions to reflect a proper balance and to allow a significant increase in the range of cases which may be dealt with by lay justices.

ISSUES THAT WOULD REQUIRE TO BE ADDRESSED IF THESE PROPOSALS ARE ACCEPTED

Court estate and staffing

58. The implications for the court estate and staffing would be different from those which would arise if the recommendation of the main Report was accepted. There would be a necessity for the Scottish Court Service to review the court estate to accommodate the two levels of court, and to employ sufficient staff, in particular legally qualified clerks, to sit with lay justices on a full or part-time basis.

Existing JPs

59. Ministers would require to note that JPs would no longer be appointed to the local authority commission areas but, on the proposal above, probably to areas based on sheriff court districts. As these districts differ from local authority areas and from police and COPFS areas in some places, we see considerable advantages in making new commission area boundaries co-terminous with sheriff court districts as well as police and COPFS areas. The commissions issued to current JPs would need to be reissued. Consideration would need to be given as to how best to match the distribution of justices to the level and location of court business.

60. We would also draw Ministers' attention to the fact that only a
fifth of Scottish justices actually sit on the bench. Our recommendations reflect a commitment to a representative bench of lay justices who sit in courts throughout Scotland. Recruitment efforts should be concentrated on such justices, and Ministers may wish to consider whether the provisions for signing justices to be recruited in the same process are appropriate.

Recruitment of justices

61. Once courts are no longer linked with local authority areas, careful thought would require to be given to achieving a high national profile for recruitment on a consistent basis across Scotland without losing the element of local involvement and ownership. We need to widen awareness of the role of the lay justice and what it offers to the community, together with a more open and externally accredited selection process.

62. The approach taken in relation to recruitment for Children's Panel members may be a useful model. We understand that a national recruitment campaign is organised and funded; this supplements local campaigns overseen by Children's Panel Advisory Committees (CPACs) using common materials, images and themes. Candidates are then interviewed and recommendations put forward to Scottish Ministers by the CPAC in each local authority area. The chairs and the majority of members of the CPACs are Ministerial appointments; others

are appointed by local authorities. We understand that the review of the Children's Hearings system will be looking at the current arrangements to consider whether they best support the system.

63. Building on the current model in the Hearings system, a possible approach in Scotland might be national recruitment of JPs, with interviewing and recommendations for appointment carried out by reconstituted Justice of the Peace Advisory Committees (JPACs) based on sheriff court districts. JPACs might have a lay chair appointed by Ministers following open competition. Members of JPACs might be recruited by public advertisement to produce a mix of lay members and members who are bench-serving justices. Consideration could be given to the nomination of one or two members from the local shrieval bench and from court users.

64. There require to be national standards and procedures for the recruitment of justices which are consistently applied across the country. Vacancies should be publicly advertised. A selection process which is transparent and fair to recruit from all backgrounds is central to the success of the system in future. Any new procedure should aspire to achieve a body of justices who truly reflect the communities they serve. Recruitment procedures both for JPACs and for justices should be compliant with the OCPA Code.

Training

65. The very best training must be provided to ensure that lay justices deliver the highest quality of service to every community in Scotland. Excellent models for competence-based training, initiated by the District Courts Association and delivered locally, already exist and are in operation to varying degrees in several commission areas. What is required is central commitment to resource and implement them across the country. We suggest that they could be directed and developed further under the auspices of the Judicial Studies Committee, leading to mandatory training programmes for new and existing justices. This might profitably involve sheriffs. Regular competence based training for clerks would also be necessary. Although training should be under the supervision of the Judicial Studies Committee, we envisage that most of the training would have to be and should be delivered locally.

66. Justices have already shown a heartening willingness to undertake training, and we can see no difficulty in this extending to the major time commitment that training to deal with more cases will involve.

Minimum number of sitting days

67. Ministers may wish to consider whether to set a formal target for the minimum number of days per year on which a justice could sit. In England and Wales at present the target is 26 half-day sessions (13 days per year). There is no simple answer to this and we recognise the different levels of demand in urban and rural areas. Nonetheless, if justices are to be well trained we recognise that the cost of that training and the commitment which it entails would need to be reflected in a commitment to sit regularly. Otherwise full advantage would not be made of the investment in training which has taken place and the justices would not sit often enough to gain the experience which they should have to sit in judgement on their fellow citizens.

68. The average figure given for Scottish sittings is 7.4 days per year. It should be borne in mind that at present there is a pool of experienced justices who are greatly underused and have the capacity and willingness to take on much more work. With more business this figure would increase. More business would also reduce running costs in most courts and make the district court division clearly cheaper than indicated in Professor Stephen's research, which did not show conclusively that lay justice is cheaper than professional justice, or vice versa.

CONCLUSION

69. We regret that our strength of feeling on this particular issue has led us to register a note of dissent to the recommendations of the Committee as a whole on this one point. However, we feel strongly that the decision on the future of lay justice should be made on the grounds of principle rather than of expediency, tidiness or personal preference.

70. We consider that, with their capacity to deal appropriately with cases on different levels of seriousness, there is a separate role for both sheriffs and lay justices in the two divisions of the summary criminal justice system, and our proposals reflect our views on this matter.

71. We submit that it is possible to remedy any perceived shortcomings in the present system without taking the more drastic step of ending the direct participation of lay people in delivering justice to those who offend in our communities.

72. We do not accept the conclusion of the majority that Scotland should now move to a wholly professional justice system. We think that with a proper selection procedure and well focused training the sentencing powers which we propose should result in a substantial amount of business being properly handled by lay justices. We

are not aware of any argument that the lay justice court, currently constituted, is in breach of ECHR. We see no reason why, with appropriate training, lay justices should not be pro-active and willing to challenge defence and prosecution delays. Revised selection procedures should allow justices to be even more representative of the communities they serve.

73. The case for the abolition of lay justice is not rooted in research or objective analysis of the performance of Scottish district courts. The argument is not whether there is a future for lay justice, but rather how the overall system can be improved to secure a future which imparts confidence to everyone: victims, witnesses, accused persons, court users and, above all else, the communities they serve.

74. Scottish justices of the peace of the 21st century continue an ancient tradition of voluntary public service. Their willingness to be actively involved in their communities' problems is worthy of support and development.

75. If Ministers were to accept the submission of COSLA that local authorities should continue to administer the district courts on the basis of full funding of this service from the Scottish Executive and an agreement of a national framework within which local administration is undertaken, we would submit that the arrangements for the division of business between the two levels of court would be as set out in this note.

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APPENDIX 3.

COSLA

To all Leaders and Conveners of Administrations

Cc Chief Executives
Law and Administration Chief Officers

Your Ref:

Our Ref: MSD/5/1

Dear Colleague,

CONSULTATION ON THE REVIEW OF SUMMARY JUSTICE

As you will know, a Committee was established, under the Chairmanship of Sheriff Principal John McInnes, to undertake a review of the Summary Justice System in Scotland. Several copies of the Committee's Report to Ministers, which contains a series of recommendations, should now have been sent to your Council. You will recall from our own consultation in November that, if these proposals are accepted, they will have a significant impact on local government across Scotland.

I am writing to ask for your assistance is ensuring that the collective views of Scottish local government are accurately reflected back to the Scottish Executive in their consultation on this crucial issue. For your information, I have also copied this to Chief Executives, Law and Administration Chief Officers and Community Safety Partnerships.

Whilst COSLA is keen to assist any attempts to improve the effectiveness and efficiency of the summary justice system in Scotland, we are also keen to ensure that it offers a genuine improvement by building upon the extensive knowledge and experience of local government.

From our initial consultation exercise on the summary justice system, we believe there are a number of difficulties with the recommendations the Committee have published. Particular difficulties relate to the unification of the Sheriff Courts and District Courts, and whether or not a national fines enforcement agency should be established. The main points to emerge from our previous consultation with Councils are outlined in Appendix 1. For your information, I have also included a press statement COSLA issued on the 16th March in Appendix 2.

There is no denying that improvements can and should be made to the overall operation of the summary justice system. However, we do not feel that the removal of over 700 full Justices of the Peace, whose experience has taken countless years to establish, is in anyone's interests. Neither do we feel that the figures used to justify the removal of district courts from local authority control are accurate or a comparison of like with like.

It may not be acceptable for us to simply say that the proposals are unacceptable without offering alternative solutions to existing problems in the summary criminal justice system. It would therefore be helpful if we could qualify any comments we make, with suggestions of how improvements may be made.

WHEN CALLING PLEASE ASK FOR: Jason McDonald 0131 474 9371 jason@cosla.gov.uk

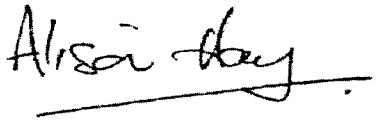
COSLA, Rosebery House, 9 Haymarket Terrace, Edinburgh EH12 5XZ
Telephone 0131 474 9200 Fax 0131 474 9292 Internet www.cosla.gov.uk

Whilst Councils are being consulted individually on the report, we are keen now to gather the views of all our members and ensure that a strong collective national local government voice is put forward, and that we take this opportunity to influence a crucial aspect of the legal system in Scotland. We strongly urge councils to take this opportunity to feed their views back to the Scottish Executive, and hope that you can share these views with COSLA.

We welcome any interim thoughts you have on the report, as well as a copy of any final responses your authority sends to the Scottish Executive. The Scottish Executive have given a deadline of the 16th July. **In order to collate a national local government response within this timeframe, and with appropriate political input, we ask that you e-mail a copy of the above information by the 25th June to Jason McDonald at jason@cosla.gov.uk.**

Many thanks for your help.

Yours sincerely,



Councillor Alison Hay
COSLA Spokesperson for Environment, Sustainability & Community Safety

CC.

Council Chief Executive's
Chairpersons of local Community Safety Partnerships
Council Law and Admin Chief. Officers
Comm Legal Services in Scotland Officers

Appendix 1

Summary of Previous Consultation Exercise (17/11/03)

Unification of the Courts

Of the 19 Councils that responded, 11 are opposed to this; 6 are in favour; and, 2 gave no view.

- Despite the frequently expressed view that local authorities have to subsidise District Courts, the majority of Councils firmly believe that summary justice should be dispensed at the most locally accessible and accountable level possible.

- There are concerns that the quality of service currently provided by the District Courts could be diminished due to loss of local knowledge and focus on the problems of the Sheriff Courts.

- Councils may suffer diseconomies of scale as a result of losing administration duties for District Courts, which at present are bound with other services such as liquor licensing, etc.

- Even among the respondents in favour of the unification, strong opposition was raised to the replacement of lay justices of the peace by a professional bench.

Establishment of a Fines Enforcement Agency

Of the 19 Councils that responded, 9 are opposed; 7 are in favour; and, 3 gave no view.

- Councils felt there was insufficient information available to properly consider the proposal.

- Concerns were raised that a less flexible and less responsive centralised agency, with the loss of a locally accessible payment/collection service, would heighten social exclusion.

- The diseconomies of scale mentioned earlier would also apply in this scenario, with the collection of fines currently being bound in with the administration of other local services.

- The valuable work done by the Local Means Inquiry Courts could be lost.

- The removal of fines enforcement from the judicial process would remove a deterrent effect from the judicial process.

We perceived that there was significant opposition to these proposals and asked the Review Committee to take account of our objections. We asked the Review Committee to recommend to Ministers that there should be a full and open consultation at the earliest opportunity, which we are pleased to see taking place now.

Appendix 2

COSLA Press Release – 16/03/04

Welcoming publication of the Sheriff McInnes report of Summary Justice COSLA's Community Safety Spokesperson Councillor Alison Hay said: "We endorse the Executive's commitment to Community Safety and reducing re-offending and as the level of government closest to communities we are in a very strong position to sit down with the Executive and address jointly identified problems.

"It is in that spirit that we will be making a detailed response to the Consultation paper. Up front we would have to say that our position will be one of opposition. Firstly to the merger of Sheriff Courts and District Courts and a national fines enforcement agency.

"Secondly there is also a marked difference of opinion in the lay versus professional bench - COSLA is not happy with a move towards an all professional bench.

"We do not believe that the Executive has presented any compelling evidence to support a restructuring of the Courts and that their objectives could easily be met in another way."