

Institution: University of Aberdeen
Unit of Assessment: UoA 20 – Law
Title of case study: Improving the Efficiency of Scottish Criminal Procedure
<p>1. Summary of the impact</p> <p>The Scottish Government has long been concerned about delays and “churn” (repeated adjournments) in the criminal justice process (<i>Firm and Fair</i> (1994, Cmnd 2600); <i>Improving Practice</i> (Scottish Executive, 2004); <i>Summary Justice Review Committee</i> (Scottish Executive, 2004)). The criminal justice research cluster in the Law School has a longstanding interest in this area, stemming from initial research into prosecutor or “fiscal fines”. Aberdeen researchers have conducted various Scottish Government funded and published studies, which have led to further academic articles. This body of research on “case trajectories” led to Duff’s appointment to the Government’s <i>Summary Justice Review Committee</i> (2001-2004) and many of its recommendations, some based on the Aberdeen research, were implemented through the Criminal Proceedings etc (Reform) (Scotland) Act 2007 which came into effect in 2008. Additionally, as a result of this research, Duff was involved in the fine-tuning of the Criminal Justice and Licensing (Scotland) Act 2010 as adviser to the Justice Committee of the Scottish Parliament.</p>
<p>2. Underpinning research</p> <p>The aims of the Scottish Government funded research carried out by Aberdeen Law School have been: to identify the reasons for delays in the Scottish criminal justice process; to evaluate reforms designed to tackle these; and to make recommendations for further improvements. These empirical studies have been associated with more theoretical work on “case trajectories”, which has looked at different solutions to problems of delay in different jurisdictions and how they relate to different analytical models of the criminal justice process, in particular the “adversarial” and “inquisitorial” systems. For instance, the Government funded evaluation of the introduction to Scotland of “fiscal” (prosecutor) fines (pub 1) led Duff to examine the origins and use of prosecutor fines in the inquisitorial systems of continental Europe. The prosecutor fine allows prosecutors to divert minor cases from the court process with a consequent reduction in court workloads and hence, policy makers hope, fewer delays in case completion. Duff did empirical work upon the extensive use of the “transaction” (a prosecutor fine) in the Netherlands by Dutch prosecutors and the theoretical implications of such an “administrative” approach to criminal justice (pub 4).</p> <p>Similarly, the Law School’s Scottish Government funded research on adjournments, pre-trial hearings and the agreement of evidence in criminal cases emphasised the need for early disclosure of evidence by the prosecution to the defence (pubs 2,3,5). It has frequently been argued by Scottish (and other) policy makers that early disclosure of the prosecution’s evidence to the defence will lead to an increase in early guilty pleas, because the accused will see the strength of the evidence against him. Thus, “case trajectories” will be shortened. In theoretical terms, however, the lack of disclosure, whether early or late, is a hall-mark of adversarial procedure and to require disclosure of the prosecution evidence to the defence arguably shifts Scottish criminal procedure towards the inquisitorial models of the Continent, where early disclosure has long been routine (pub 6). Further, policy makers and legal practitioners have suggested that the practical effects of early disclosure can be greatly increased by “sentence discounting” (ie reducing sentences in return for early pleas), an argument which was borne out by the above research carried out by the Aberdeen Law School. Sentence discounting causes much controversy in academic circles and Leverick (Senior Lecturer) published a theoretical article on this topic while still at Aberdeen (pub 7). As regards the disclosure debate, the Privy Council’s ground-breaking decision in <i>Holland and Sinclair v HMA</i> 2005 SC(PC) 3, 28, made reform a matter of urgency, and Duff has commented on the issue in practitioner titles (“Sinclair and Holland: A revolution in disclosure”, 2005 SLT(News) 105-111; “Dislosure, PII and the confidentiality of personal records”, 2010 SLT(News) 181-184) and academic journals (pub 6).</p>

3. References to the research

(All authors were at Aberdeen Law School at time of research and publication.)

1. P Duff, K Meechan, M Christie and D Lessels, 1996, *Fiscal Fines* (Scottish Office Central Research Unit: ISBN 07480 5681 5), (£32,000 from Crown Office).
2. F McCallum and P Duff, 2000, *Intermediate Diets, First Diets and Agreement of Evidence in Criminal Cases: An Evaluation* (Scottish Executive Central Research Unit: ISBN 07480 9409 1); (£79,000 funding from Scottish Executive).
3. F Leverick and P Duff, 2001, *Adjournments of Summary Criminal Cases in the Sheriff Courts* (Scottish Executive Central Research Unit: ISBN 07559 3240 4); (£79,765 funding from Scottish Executive).
- 4 P Duff, 1993, 'The Prosecutor Fine', (14) *Oxford Journal of Legal Studies* 565-587.
5. F Leverick and P Duff, "Court Culture and Adjournments in Criminal Cases: A Tale of Four Courts", 2002 *Criminal Law Review* 39.
6. P Duff, 2007, 'Disclosure in Scottish Criminal Procedure: Another Step in an Inquisitorial Direction', 11 E&P (*Evidence and Proof*) 153-180 (submitted to RAE 2008).
7. F Leverick, 2004, "Tensions and balances, costs and rewards: the sentence discount in Scotland", 8 *Edinburgh Law Review* 360-388.

4. Details of the impact

The main impact of the case trajectories research since 2008 has been on the Criminal Proceedings etc (Reform) (Scotland) Act 2007, most of which came into effect in 2008, and the Criminal Justice and Licensing (Scotland) Act 2010, implemented in 2010 and 2011. The influence of the research is best described chronologically.

The evaluation of the fiscal fine as means of diverting cases from the criminal courts to shorten 'case trajectories' and reduce court workloads showed that this system worked well (**pub 1**). This study was drawn on extensively when the fiscal fine system was expanded in 1996 by increasing it from £25 to a maximum of £100 by legislation in 1996. The *Summary Justice Review Committee*, of which Duff was a member, returned to this topic in 2002-2004, and as result of Duff's earlier comparative research on prosecutor fines (**pub 4**), visited the Netherlands (paras 1.13, 11.20) to see how the more ambitious Dutch "transaction" worked. The Committee recommended a further increase in the maximum fiscal fine (to £500) and suggested that, as in the Netherlands, courts should be made aware of previous fiscal fines offered to the accused. It also recommended that the system should be changed from one of "opt in" to "opt out" (ie the fiscal fine is deemed to have been accepted unless the recipient expressly refuses it), mainly because of the findings in the Aberdeen research (**pub 1**) that a significant proportion of court workloads involved unanswered offers of fiscal fines where the recipient had no intention of disputing guilt (paras 7. 37-38 and footnote 29). On March 10th 2008, the Criminal Proceedings etc (Reform) (Scotland) Act 2007, s 50 (amending s 302 of the Criminal Procedure (Scotland) Act 1995) implemented these changes. According to the Crown Office figures, the number of cases disposed of by fiscal fine immediately increased from 18,922 in 2007-8 to 36,903 in 2008-9 and reached 41,196 by 2011-12. The number of cases going to court dropped from 127,418 in 2007-8 to 118,867 in 2008-9 and to 101,606 by 2011-12. Thus, the reforms to the prosecutor fine in 2008, in which the work carried out at Aberdeen was influential, have had a major impact on the trajectories of criminal cases.

Aberdeen scholars' research on adjournments and pre-trial hearings confirmed the need to secure early disclosure of evidence by the prosecution to the defence as means of shortening "case trajectories" (**pubs 2,3**). The Privy Council's "revolutionary" decision in *Holland and Sinclair* (see above) meant that there was an urgent need to create a new disclosure regime in Scotland which would be compliant with the ECHR. The Government saw this as an opportunity also to encourage prompt disclosure, both to encourage early guilty pleas and reduce pre-trial adjournments as a result of late disclosure by the prosecution. A new statutory regime was set out in 2009 in the

Criminal Justice and Licensing (Scotland) Bill. As a result of Duff's publications on disclosure and criminal justice, he was appointed as adviser to the Scottish Parliament's Justice Committee at Stage 1 of the Bill. The task involved the analysis of written evidence submitted to the Committee, advising MSPs what questions to ask of witnesses who gave oral evidence before the Committee and attending such sessions to advise the MSPs. The Justice Committee's Stage 1 Report on the Bill was published on 12th November **2009** (Scottish Parliament Paper 334). Ultimately, Part 6 of the Criminal Justice and Licensing (Scotland) Act **2010** implemented the new disclosure scheme which is now in force and has led to changes in prosecution practice (see COPFS Disclosure Manual 9th edition, Crown Office and Procurator Fiscal Service, June 2011).

As a result of Duff's research and publications, he was asked to join a research team to evaluate the new statutory disclosure regime's effect on "case trajectories". The project was led by the Scottish Centre for Social Research and won the competitive tender to secure the Scottish Government funding. The report was published in **2012** (Bradshaw, Sharp, Duff, Tata, Barry, Munro & McCrone – only Duff is at Aberdeen) *Evaluation of the Reforms to Legal Aid and Disclosure*, 2012: Scottish Government Social Research: ISBN 978-1-78045-897-7) (£119,473 funding). It found that, as a result of increased disclosure, there was an increase in the proportion of accused pleading guilty at an early stage. There was some evidence that the extent, quality and speed of disclosure varied across different police forces and prosecution offices. Delays in the disclosure of CCTV evidence, forensic reports and full witness statements were commonplace. These findings will inevitably result in further adjustments by the police and Crown Office to increase the efficiency of the new regime.

Duff's published research on disclosure in both practitioner (SLT – see above) and academic journals (**pub 6**) also led to him being invited to conduct various training sessions for sheriffs and High Court judges, around 20 attending each session, on the new provisions at the request of the Judicial Studies Committee, which is responsible for judicial training in Scotland (6th Oct **2009**, 24th Nov **2009**, 1st Feb **2010**, and 31st May **2010**). He has also given training to various groups of lawyers on the 2010 Act as part of their regular CPD training.

5. Sources to corroborate the impact

1. *Report to Ministers*, The Summary Justice Review Committee (Scottish Executive, 2004) pages, 2, 4, 68, 69, 112;
2. Crown Office and Procurator Fiscal Service, *Corporate Information, Case Processing, Last 5 years* at <http://www.crownoffice.gov.uk/images/Documents/Statistics/Case%20Processing%20Last%205%20Years%202008-13.pdf> ;
3. Crown Office and Procurator Fiscal Service, *Disclosure Manual 9th edition*, (June 2011), at <http://www.crownoffice.gov.uk/publications/prosecution-policy-and-guidance#DM>
4. Chief Operations Officer of the Scottish Court Service; will corroborate that Professor Duff's research has helped to reduce Scottish criminal court workloads
5. In relation to the impact of the research on the Crown Office and Procurator Fiscal Service, the Principal of St Hugh's College, University of Oxford and former (2001-2011) Solicitor General for Scotland and Lord Advocate has provided a testimonial available from the HEI on request;
6. A sheriff of the Sheriffs' Association, Judiciary of Scotland has provided a statement which states how Professor Duff's work has helped to increase the efficiency of the Scottish criminal courts;
7. A Senior Researcher at the Justice & Social Affairs Research Unit, Scottish Parliament Information Centre has provided a testimonial which corroborates Professor Duff's membership of the Summary Justice Review Committee and the influence of that committee on the reform of Scottish criminal procedure.
8. The Scottish Parliament Justice Committee Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill (2009).