

Legal Studies Research Findings No. 37

The Public Defence Solicitors' Office in Edinburgh

An Independent Evaluation

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The Public Defence Solicitors' Office (PDSO) was established in Edinburgh on 1 October 1998. The enabling legislation required that it be formally evaluated, and a report presented to Parliament within three years. Research was therefore commissioned to compare criminal defence services delivered through the PDSO with those delivered through private practice solicitors under the legal aid scheme. The comparison was undertaken with reference to four criteria:

- cost-effectiveness;
- the quality of services provided;
- client satisfaction; and
- the contribution of each delivery method to the efficiency of the criminal justice system, including the impact on the courts, the Procurator Fiscal service, the police and the judiciary.

Introduction

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This study was confined to representation in summary proceedings (that is, proceedings without a jury). During the period of the study, the Office did not undertake solemn work, before a judge and jury.

To aid the research and help the PDSO build up a sufficient volume of casework within the timeframe, a sample of clients was "directed" to use the Office. This meant that accused people born in January or February who were facing summary prosecution in Edinburgh Sheriff or District Courts were not eligible for "normal" legal aid through private solicitors. Unless they were granted a waiver, most forms of legal aid were only available to them through the PDSO. Those born at other times of the year had a choice: they could either use the PDSO or a private defence solicitor.

The direction system ran from 1 October 1998 to 1 July 2000. It was then replaced with a system whereby the PDSO took over 60% of the Sheriff Court summary duty solicitor scheme.

The imposition of a three-year statutory deadline meant that the PDSO was evaluated at an early stage in its life, before it had reached maturity.

Method

The research centres around a quantitative study of some 2,600 cases that started in Edinburgh Sheriff or District Courts between 1 April and 31 December 1999 (and finished by November 2000). It compares a sample of directed accused, born in January or February, with a control group of non-directed accused born in November or December. It focuses on how cases proceeded through the courts (particularly plea and stage of resolution), on their outcome (conviction and sentence), and on their cost.

Questionnaires were also sent to a sample of clients who had received summary legal aid.

These quantitative data were supplemented by 48 qualitative interviews with criminal justice actors, including private defence solicitors, public defence solicitors, clients, sheriffs, justices of the peace, procurators fiscal, court clerks and social work agencies.

The System of Direction in Practice

The system of direction proved unpopular with many clients and private criminal defence practitioners, and put considerable strain on the PDSO's working relationships.

It had been suggested that some directed accused (born in January or February) would prefer to appear in court unrepresented, rather than be represented by the PDSO. The research found no evidence of this. Representation rates were similar between the two groups, at 71–72%.

However, many January- and February-born accused used private solicitors rather than the PDSO. Out of represented, directed clients, three-fifths (60%) used a private solicitor as either their only representative or for a substantial part of their case. Of those using private solicitors, almost a

fifth (18%) obtained a waiver for summary legal aid, and just under a third (30%) used other forms of legal aid, either with or without a waiver. Over half (52%) were represented without legal aid. Although some of these cases may have been paid for privately, solicitors also carried through their stated intentions to retain a number of existing clients by acting on an unpaid basis.

This had two implications for the PDSO. The first was that the number of cases reaching the Office was less than anticipated. This resulted in some over-capacity, especially in the year April 1999 to March 2000, and increased average case costs.

The second implication was that cases reaching the PDSO were not a random selection of all summary cases. PDSO cases were more likely to involve an initial appearance from custody. The PDSO also dealt with more crimes of violence and fewer road-traffic cases. These differences have been controlled for in the research by using multi-variate analysis.

Private solicitors indicated that in deciding whether or not to act without payment for existing clients, they were more likely to represent those who expressed an intention to plead guilty. Therefore, cases reaching the PDSO may have been less likely to include clients who wished to make an initial plea of guilty. This suggests a more subtle difference than can be controlled for using case and client characteristics alone. It is difficult to quantify this additional effect but it has been borne in mind in drawing conclusions from the research.

Perceptions of other Criminal Justice Professionals

Most solicitors employed by the PDSO had practised in Edinburgh and were members of the Edinburgh criminal justice community. The perception of the criminal justice professionals interviewed was that they were much like other defence solicitors. Although the quantitative study

revealed differences in the way they processed cases through the court, these should be seen within a context of similarity.

Criminal justice professionals judge defence solicitors largely on the basis of their advocacy. Those interviewed had observed public defence solicitors in court and they thought that the PDSO's quality of advocacy was much the same as that of other solicitor firms.

Outcomes

Stage of resolution

There has been considerable discussion about how far the Scottish system of summary legal aid provides incentives to solicitors to encourage initial pleas of not guilty. The qualitative interviews showed that decisions over plea are complex and are driven by a range of factors. The decision rests with the accused, but is influenced by advice from the defence solicitor who in turn is influenced by the actual or predicted actions of the prosecution and the predicted reaction of the Sheriff. The complexity of the decision gives rise to ethical indeterminacy, where ethical practitioners may genuinely differ over the correct course of action. Without a clear right or wrong answer, there is scope for the financial incentives under which solicitors operate to influence their approach.

The interviews did not reveal substantive differences between private and public defence solicitors in the way that they approached advice on plea. However, they did show differences in tone and emphasis. When in doubt, private solicitors said they would advocate a not guilty plea: one that exercised the accused's right to put the prosecution to proof. PDSO solicitors stressed that they would never pressurise a reluctant client to plead guilty. However, they felt they were more focused on "not messing around" and "not wasting time and money". Arguments can be put for and against both approaches.

These differences in emphasis led to clear differences in the way that cases proceeded through the courts. PDSO cases were more likely to be resolved at the pleading diet or intermediate diet, and less likely to be resolved at a trial diet, either before or after evidence was led. The finding was robust. In the court samples, of cases where the time of resolution was known, 59% of private non-directed cases were resolved at pleading or intermediate diet, compared with 65% of PDSO cases. When one uses multiple-regression analysis to control for known variations in cases, the difference widens. The analysis suggests that, had the PDSO dealt with similar cases as private solicitors, over 70% would have been resolved at pleading or intermediate diet. If, as discussed above, PDSO cases were also less likely to include clients who said they wished to plead guilty, the difference would be even greater.

This finding – that the PDSO resolved cases at an earlier stage – is in line with previous Canadian studies, which found that public defenders entered more guilty pleas, at an earlier stage, and spent less time per case than private solicitors.

Detention in custody

PDSO clients were less likely to be held in detention during the course of the case (that is after the first diet and before sentence). There may be several explanations for this, including the fact that PDSO cases involved fewer diets and that the Office had developed good links with the SACRO bail scheme.

Conviction rate

Most accused proceeded against summarily in the Sheriff or District Courts are convicted of at least something. Among privately-represented, non-directed accused, 83% received a conviction of some sort. This was usually through a plea of guilty. Of those convicted, 91% pled guilty, compared with 9% found guilty after trial. Among those not convicted, around two-thirds had the case against them abandoned by the prosecution, compared to

one-third found not guilty after evidence was led. This demonstrates the relatively minor role played by contested trials. Evidence was led in only 13% of cases.

PDSO cases were more likely to conclude with a conviction of some sort. The difference in conviction rate was small but statistically significant. When one controls for variations in case type, around 88% of PDSO clients were convicted, compared with 83% of private, non-directed clients. If (as discussed earlier) there were further biases against guilty pleas in cases reaching the PDSO, the effect would be stronger.

The data showed that the longer an accused persisted with a plea of not guilty, the greater their chances of not being convicted. The chances that the prosecution would be abandoned – almost negligible at the pleading diet – rose at the intermediate diet and became appreciably greater just before the trial started, when the prosecution discovered whether or not witnesses had appeared. The chances of acquittal were highest after evidence had been led. Thus, the higher rate of conviction is linked to the PDSO's tendency to resolve cases at an earlier stage. By pleading guilty at the pleading diet or intermediate diet, clients exchange the small but measurable chance of a later acquittal for the certainty of immediate conviction.

This finding differs from several Canadian studies which found that, despite a higher rate of guilty pleas, the overall conviction rate was much the same.

Negotiated pleas

Canadian research has suggested that public defenders were more likely to reach negotiated settlements with the prosecution. In Edinburgh, there was no special relationship between the PDSO and the Fiscal service, though the Procurators Fiscal we talked to thought that the Office was somewhat more pro-active and efficient

at putting forward mixed pleas (such as guilty to some charges but not others, or guilty to a lesser charge).

The quantitative data suggested that the PDSO may be more likely to conclude a case with a mixed plea, negotiated with the prosecution, rather than through a plea of guilty as libelled. However, statistical testing showed that this finding was not robust. It may well have occurred by chance.

Sentence

The data showed few discernible differences in sentence. Both private non-directed and PDSO clients faced the same rate of imprisonment and – when they were imprisoned – similar lengths of sentence. Nor could we find any difference in the rate at which serious sentences (custody or community) were imposed, compared with the less serious sentences of driving disqualification, fines or admonitions. The only possible difference was that PDSO clients may have received slightly lower fines (an average of £170, compared with £203 for private non-directed clients). However, even this effect was not statistically robust.

The similarity in sentencing again differs from the findings of Canadian research, in which more and earlier guilty pleas led to a reduction in the use of custody. Scotland has little tradition of offering sentence discounts for early pleas. In 1987, the High Court held that imposing a discounted sentence to encourage guilty pleas was objectionable. Although the Criminal Procedure (Scotland) Act 1995, section 196 now allows the court to take into account the stage at which an offender indicated an intention to plead guilty, it is couched in discretionary terms.

Research interviews suggested that solicitors could find mitigating factors in both early and late pleas: for early pleas they could stress the client's remorse and cite section 196; for late pleas they could point to the changes that had occurred since the offence. The quantitative data suggest that

these largely cancel each other out. When one compares all those born in January and February with all those born in November and December, it appears that (for reasons unconnected with the crime but linked to how their solicitors were paid) January- and February-born accused tended to plead guilty earlier. As a result, they had a slightly higher rate of conviction but, once convicted, no measurable difference in sentences.

Client Satisfaction

Criminal clients valued the right to choose their solicitor, and many resented being directed to use the PDSO. This clearly affected their views of public defence solicitors. Although many clients accepted the PDSO in the light of their experience of using it, others did not. When asked whether they would use the firm again, only 46% of directed PDSO clients said that they would, compared with 83% of private practice solicitors' clients.

The levels of trust and satisfaction expressed by directed PDSO clients were consistently lower than those expressed by clients using private practitioners. Directed PDSO clients were less likely to say that their solicitor had done "a very good job" in listening to what they had to say; telling them what was happening; being there when they wanted them; or having enough time for them. They were also less likely to agree strongly that the solicitor had told the court their side of the story or treated them as though they mattered. Of particular concern was the fact that only 39% agreed strongly that their solicitor "had really stood up for their rights", compared with 71% of private solicitor clients.

We supplemented the main study of client satisfaction by sending questionnaires to those who had used the PDSO after direction ended in July 2000. This allowed us to compare the responses of directed and private clients with a small sample of people who had used the PDSO voluntarily. The

views expressed by volunteer clients were more positive than those expressed by directed clients, and in many instances they were not significantly different from those of private clients. However, volunteers were significantly less likely than private clients to agree strongly that their lawyer had told the court their side of the story or had treated them as if they mattered, rather than as “a job to be done”. Two issues stand out for concern. Volunteers were less likely to agree strongly that the PDSO had really stood up for their rights: only 48% agreed strongly, compared with 71% of private clients. They were also less likely to say that they would use the firm again: 60% said they would, compared with 83% of private clients.

Legal Aid Costs

Average case costs

The discussion of costs concentrates on “cost to the public purse”: that is, on expenditure by the taxpayer rather than on what it cost solicitors to provide the service. It therefore compares the cost of legal aid payments to private solicitors with the cost to the Scottish Legal Aid Board of providing a service through the PDSO.

There are many ways of comparing the average cost of cases, depending on how one calculates the PDSO’s hourly rate, how one treats VAT and what provision one makes for private solicitors’ unpaid work.

On most assumptions, PDSO and private sector costs were not significantly different. Thus if one uses the PDSO’s lower 2000/01 unit costs, or excludes private non-legally-aided work, or includes VAT, or allows for the fact that the PDSO cases may have included an additional bias against guilty pleas, PDSO and private costs were broadly similar.

On only one combination of assumptions did the PDSO’s costs work out as significantly different from those of private practitioners acting for non-

directed clients. If one takes the 1999/2000 rate, allows for some non-legally-aided work, excludes VAT and makes no allowance for additional guilty pleas, then the PDSO’s average case costs exceeded that of private practice by around £65.

The PDSO average case costs were highly sensitive to the amount of work it undertook. By resolving cases at an earlier stage, public defence solicitors have the potential to be cheaper. However, the PDSO would only be able to realise this potential if it secured a greater volume of work. The report suggests that, in order to demonstrate clear reductions in average case cost over private practice, it would need to realise anticipated cost-saving and increase case volumes by 15% on the 2000/01 levels. Alternatively, it would need to reduce solicitor numbers from five to four. We cannot know what effect such increases in workload would have on outcomes, if for example, public defence solicitors had less time to negotiate pleas or prepare cases.

Breaking down legal aid costs by stage of resolution

Summary legal aid pays private solicitors through fixed payments, which work on the principle that what solicitors “lose on the swings, they gain on the roundabouts”. When one looks at the legal aid system as a whole, and compares legal aid payments with PDSO costs, the least profitable “swings” would appear to be cases resolved at pleading diet or after evidence was led. The more profitable “roundabouts” are cases resolved at intermediate diet.

If one assumes that the PDSO costs are a rough indication of the costs incurred by private practitioners in supplying the service, the least profitable work, from the private practice perspective, was resolving cases at pleading diet under the Advice and Assistance scheme. Private payments averaged £70 to £75, compared with PDSO costs of around £150 to £176. One effect of

the Scottish system of criminal legal aid is that private solicitors are faced with financial disincentives to advise initial guilty pleas.

Impact on the Rest of the Criminal Justice System

The fact that public defence solicitors resolved cases at an earlier stage had a favourable impact on court and prosecution costs. It is difficult to quantify this effect precisely. Our calculations, based on published cost figures, suggest that PDSO Sheriff Court cases cost the Scottish Court Service at least 11% less to process through the courts. Similarly, they cost the Crown Office at least 5% less in prosecution costs.

The fact that PDSO cases were more likely to be resolved at pleading diet or intermediate diet, and less likely to involve a trial diet, meant that fewer witnesses were inconvenienced by being called to court only to find that their evidence was not required. In broad terms, every 100 privately-represented cases generated 44 cancelled trials, in which a scheduled trial did not take place (usually because of a plea or adjournment). These 44 trials involved some 175 wasted visits for witnesses: around half from police officers and half from civilians. Two or three were children. By contrast, 100 cases handled by the PDSO would produce 31 ineffective trial diets, inconveniencing 123 witnesses of whom one or two would be children.

Conclusion

Public and private defence solicitors share many similarities. However, public defence solicitors tend to resolve cases at an earlier stage in the proceedings. This is the main point of difference between the two delivery methods and has ramifications for both costs and outcomes.

Resolving cases earlier has the potential to save legal aid (and thus the taxpayer) costs – though the PDSO would need to secure further increases in work (or make further reductions to staffing levels) for this potential to be realised. It also reduces court and prosecution costs. Fewer witnesses are inconvenienced. Clients are spared the wait and worry of repeated court diets and are less likely to be held in detention pending the resolution of their case.

On the other hand, earlier resolution also leads to a small but measurable increase in conviction rate. By pleading guilty at the pleading diet or intermediate diet, rather than holding on until the day of the trial, clients substitute the certainty of conviction for the possibility that the prosecution case will collapse. Under the Scottish sentencing system, they are given no clear sentence discount for this behaviour. Clients may also feel less supported by public defenders – that by encouraging earlier resolution, they were not “really standing up for their rights”.

Scotland's policy-makers face the responsibility of weighing the findings of the report so as to balance the competing demands of justice.

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