

Criminal Justice

An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) (Scotland) Act 2004

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In recent years there has been growing concern about the efficiency of the processing of cases through the High Court and, in particular, the phenomenon of the “churning” of cases. This refers to the increasing number of cases listed for trial where the trial does not go ahead and the case is adjourned to a future trial date, a process that is often repeated several times before the case is finally resolved. As a result of this concern, Lord Bonomy was appointed in December 2001 to carry out a review of High Court practice and procedure in order to produce recommendations aimed at reducing churning and the associated problems. His key proposal, namely the introduction of mandatory “preliminary hearings” between the service of the indictment and the trial, and various other associated measures were implemented by the Criminal Procedure (Amendment) (Scotland) Act 2004, which came into effect on 1 April 2005. The aim of this research was to assess the extent to which the new regime in the High Court was successful in overcoming the problems of adjournment and delay in the High Court.

Main findings

- Preliminary hearings are working effectively. Only 33.3% of cases in the post-reform sample required a trial diet compared with 94% of cases in the pre-reform sample.
- It is now rare for a trial diet to be adjourned. Only 4.5% of cases in the post-reform sample involved an adjournment of a trial diet compared with 32.6% of cases in the pre-reform sample.
- Witness inconvenience appears to have been vastly reduced as a result. On a very crude measure (which assumes that all witnesses listed on indictments were inconvenienced when trials did not go ahead), 16,795 Crown witnesses in the pre-reform sample were inconvenienced by adjourned trial diets, compared to 1,295 in the post-reform sample.
- It is now rare for a guilty plea to be tendered at a trial diet: only 11.3% of trial diets resulted in such a plea in the post-reform sample, compared to 34.8% of trial diets in the pre-reform sample.
- The use of the “section 76 procedure” for accelerated guilty pleas has increased: 30.7% of guilty pleas were tendered at a section 76 hearing in the post-reform sample, compared to 10.3% in the pre-reform sample.
- The number of continued preliminary hearings is higher than anticipated. In the post-reform sample, 38.7% of cases had two or more preliminary hearings; indeed, 10.6% of cases had four or more preliminary hearings. In fact, the most common outcome of a preliminary hearing was for that preliminary hearing to be continued.

- The growing number of continued preliminary hearings has the potential partially to undermine the success of the reforms. This phenomenon creates the risk of a return to the “adjournment culture” and the consequent churning of cases.
- There is evidence to suggest that the new 140-day time bar is being extended almost as frequently as the old 110-day time bar.
- There was considerable variation in judicial practice in relation to the conduct of preliminary hearings, particularly after the pool of judges conducting these was expanded.
- It was the view of virtually all respondents that it was vital to the long term success of the reforms that judges were prepared to be proactive in managing preliminary hearings

Background

The key procedural changes introduced by the 2004 Act were as follows:

- Mandatory “preliminary hearings”, for judicial management of cases, between the service of the indictment and the trial.
- A requirement for judges to state in open court whether a sentence has been ‘discounted’ for a plea of guilty, particularly an early plea and, if so, by how much. This change was preceded in October 2003 by the decision of the High Court in *Du Plooy v HM Advocate* which gave clear approval to a more explicit scheme of sentence discounting than had earlier been the case.
- Replacement of the 110-day time bar – which required that, where a person was remanded in custody pending trial, their trial should commence within 110 days – with a 140-day time bar in the High Court.

In addition, the maximum solemn sentencing powers of Sheriffs were increased from three to five years imprisonment from 1 May 2004, allowing some less serious High Court indictments to be transferred to the sheriff courts.

Methods

There were four main components of the research:

- The collection and analysis of statistical data, primarily drawn from the Scottish Court Service’s High Court Case Management System (HCCMS).
- Interviews with key criminal justice personnel, principally High Court judges, Advocate Deputes, defence counsel, and representatives of victim support organisations.
- Questionnaire surveys of professional witnesses and jurors.
- Observations of High Court proceedings by the research team.

It should be noted that the statistics relating to High Court cases cannot be taken to represent a completely accurate portrait of case “trajectories” in the High Court. While the pre-reform and post-reform samples were directly comparable, and thus could be used to evaluate the reforms, the time scale within which the research had to be concluded meant that both samples excluded many of the longer-running cases.

Trials and Adjournments

There is considerable evidence to indicate that preliminary hearings are working effectively in ensuring that trial dates are set only for cases that require them and are actually ready to go to trial. In the post-reform sample, only 33.3% of cases required a trial diet whereas the equivalent figure for the pre-reform sample was 94%.

It is now rare for a trial diet to be adjourned: only 16.2% of trial diets in the post-reform sample resulted in an adjournment, compared to 37.1% of trial diets in the pre-reform sample. Looked at in another way, only 4.5% of cases in the post-reform sample had at least one adjournment of a trial diet compared to 32.6% of cases in the pre-reform sample.

Witnesses and Victims

There is evidence to suggest that witness inconvenience has been vastly reduced following the reforms. As noted above, not only is the proportion of cases that proceed to a trial diet far lower in the post-reform sample but the incidence of adjourned trial diets has also been vastly reduced. On a very crude measure (which assumes that all of the witnesses listed on the indictment were inconvenienced when a trial did not go ahead on the scheduled date), 16,795 Crown witnesses in the pre-reform sample were inconvenienced by adjourned trial diets, compared to 1,295 in the post-reform sample.

The findings also suggest that agreement of evidence may be more common following the reforms, thus reducing witness inconvenience still further. The average trial length in the post-reform sample was shorter than that in the pre-reform sample (4.9 days compared to 5.9 days) and this could not be accounted for by the cases in the post-reform sample being less complex; if anything the reverse was true. The proportion of Crown witnesses listed on the indictment who actually gave evidence was also slightly lower in the post-reform sample – an average of 47.8%, compared to 50.6% in the pre-reform sample. Both of these findings suggest that there may have been an increase in the use of the agreement of evidence provisions in the 1995 Act or, equally, it may be that more time is now available for case preparation, enabling the parties better to identify those witnesses who are actually necessary to the case.

Timing of Pleas

There is considerable evidence that while the proportion of guilty pleas has not altered, such pleas are offered at an earlier stage in the process. As noted above, prior to the reforms the vast majority of guilty pleas (89.7%) were entered at a trial diet, this usually being the first real opportunity to plead guilty, whereas only a small minority of such pleas (6.9%) were entered at a trial diet in the post-reform sample. Similarly, the proportion of trial diets which were concluded by the acceptance of a guilty plea has decreased sharply - from 34.8% to 11.3%.

In particular, the use of the section 76 procedure for accelerated guilty pleas has increased dramatically: 30.7% of guilty pleas were tendered at a section 76 hearing in the post-reform sample, compared to 10.3% in the pre-reform sample. Rather than being a result of the High Court reforms *per se*, the main reasons for this were: the decision in *Du Plooy* (the effect of which was strengthened by the increased emphasis on sentence discounting in the statute); the introduction of a fixed Legal Aid fee (which is perceived to be quite generous) for a section 76 appearance; and possibly the earlier disclosure of the prosecution case to the defence (now required by the decisions of the Judicial Committee of the Privy Council in *Holland* and *Sinclair* but facilitated by the reforms).

Continued Preliminary Hearings

The number of continuations of preliminary hearings has surprised key criminal justice personnel, although most stressed that such a continuation does not normally have the same adverse consequences for victims and witnesses as the adjournment of a trial. The proportion of preliminary

hearings that are continued is perceived to be rising and this is resulting in scheduling difficulties for the High Court. In the view of most respondents interviewed in the latter stages of the research, this phenomenon creates the risk of a return to the adjournment culture and the consequent churning of cases.

The problem is clearly demonstrated by the analysis of the sample of post-reform cases: 42.8% of preliminary hearings resulted in a continuation to another preliminary hearing, whereas 26.7% resulted in a guilty plea and 23.4% in a trial date being set. Looked at in another way, 38.7% of cases had two or more preliminary hearings; indeed, 10.6% of cases had four or more preliminary hearings. Continued preliminary hearings were most common in rape cases and cases involving other sexual offences, which do tend to be more complicated procedurally than the norm. It is fair to say that the cases which involved multiple preliminary hearings did tend to go on to an eventual trial, illustrating that there was little possibility of an agreed outcome.

A principal factor in the number of continuations was thought to be a growing variation in judicial approach to preliminary hearings. It was said that some judges take a less pro-active and stringent approach than was originally adopted immediately after the reforms and this was emphatically borne out by the research team's court observations.

Judges

Both prior to and after the reforms, it was generally agreed that the success or otherwise of the new High Court procedures was in the hands of the judges. They are in the best position by far to manage cases effectively and are largely responsible for setting the "culture" of the court. Prior to the introduction of the new procedures, there was some concern that variation in judicial practice had the potential for undermining the reforms and this has been borne out in practice. It was a common view that the relatively small cohort of judges initially charged with conducting preliminary hearings had adopted a relatively consistent and pro-active approach to preliminary hearings and the management of cases but that the expansion of this group had seen much more variation in judicial practice.

In the view of virtually all respondents, it is vital to the long-term success of the reforms that judges continue to take a pro-active approach to case management, conducting preliminary hearings robustly to check on the parties' state of preparation, querying any delays, and vigorously questioning the reasons for any continuations requested.

Other Issues

The increase in the time limit within which High Court custody cases must be brought to trial, from 110 days to 140 days, has not succeeded in significantly reducing the number of extensions of time limits that are requested and granted. There was at least one extension granted to the custody time bar in 25% of cases in the pre-reform sample compared to 21.5% of cases in the post-reform sample. As a result of the way in which the samples were generated, this is likely to be an underestimate of the proportion of cases in which an extension was granted both prior to and subsequent to the reforms. It was generally agreed that the need to ensure a fair trial often makes it very difficult for judges to refuse to grant an application for an extension of the time limit.

It was not possible to determine the impact of the increase in the sentencing powers of the sheriff courts with any certainty but it seems likely that around 100 to 150 cases per year have been taken out of the High Court and are now being prosecuted in the sheriff courts.

There was a sharp division of opinion about the impact of the reforms, along with the resultant restructuring of Legal Aid, upon the criminal bar. A few senior counsel thought that the loss of income would lead to an exodus of experienced practitioners and a lack of “new blood” coming in, whereas others thought that the money that was previously available as a result of the inefficiencies of the system had disappeared and that this was no bad thing.

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