Inspectorate of Prosecution in Scotland

Summary Case Preparation

Thematic Report

August 2012

The Scottish Government

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CHAPTER 1 - BACKGROUND

1. The Inspectorate, in keeping with current inspection philosophy and government policy, takes a 'risk' based approach to the selection of topics.

2. There has been for some time concern about the efficiency of the summary courts in Scotland (and elsewhere) and a growing need to make efficiency savings against a backdrop of reducing budgets for the various parties. The question of 'churn' or the unnecessary continuation of cases from one court diet to the next has received much attention.

3. This, combined with some high profile summary cases which had gone astray due to poor preparation by the Crown, meant the topic rose to the top of the Inspectorate's agenda.

4. There is a need to balance cost and efficiency on the one hand with the dictates of justice on the other, not least the accused's right under ECHR legislation to a fair trial.

5. The criminal justice system is a complex one consisting of many parties, each independent of the other, and is not amenable to simplistic solutions. Some have even questioned whether the word 'system' is appropriate (eg the Normand Report referred to below).

6. Efforts to improve the system have continued for many years. Some examples include:

    - The Thomson Report – Cmnd 6218 (1975)
    - The Stewart Committee – Cmnd 8958
    - Creation of Intermediate Diets – Criminal Justice (Scotland) Act 1980
    - Review of High Court practices etc by the Rt Hon Lord Bonomy 2002
    - The Normand Report 2003 on the Aims, Objectives and Targets of the Scottish Criminal Justice System
    - McInnes Report to Ministers 2004
    - Report by the Rt Hon Lord Gill on Scottish Civil Courts 2009
    - Creation of the Scottish Parliament and devolution
    - Review of Disclosure by the Rt Hon Lord Coulsfield 2007
    - The Making Justice Work initiatives
    - The Audit Scotland Report, Overview of Scotland's Criminal Justice System 2011
    - Report on Criminal Law and Practice by the Rt Hon Lord Carloway 2011

7. The Summary Justice Reform (SJR) model introduced in 2007 following the McInnes Report had as some of its aims:

    - Cases would come to court more quickly
    - Cases would be dealt with at the earliest possible stage in proceedings
    - Early, effective preparation
    - More effective court hearings

8. This, if achieved, would result in fewer trials being scheduled which did not go ahead, fewer victims and witnesses cited to court to give evidence, and a summary justice system that would live up to its name and would be truly summary in nature.

9. All these initiatives have shared the aim of improving the system with particular focus recently on the treatment of victims and witnesses seen by some as the ‘poor relations’ of the system compared with the focus on the accused.

10. An overarching development has been a raising of the threshold at which cases enter the various tiers of the court system. This has been accompanied by an increase in sentencing powers of the lower courts now up to a year before a sheriff sitting alone. Thus cases which would traditionally have gone to the High Court are now heard in the Sheriff and Jury court and likewise the summary courts are routinely hearing cases previously ascribed to the jury courts. This is not without considerable impact on the summary courts. Traditionally the more serious the case the more resources were put into preparation of it including precognition of witnesses, analysis of evidence etc. The raising of the thresholds (involving more serious offences) has had an impact on the summary courts. This was borne out by our extensive case review.

11. The criminal justice system presents something of a moving target for inspection agencies. This particular inspection coincided with possibly the biggest shift in approach by the Crown Office and Procurator Fiscal Service (COPFS) as to where and by whom cases are prepared and processed.

12. Traditionally the investigation and prosecution of crime was a responsibility of District Procurators Fiscal appointed by the Lord Advocate. This gave ownership of all the work in the district and facilitated local relationships with bench, bar, police, clerks, social workers and others.

13. However, from April 2012, the Crown Office has restructured into three geographical ‘Federations’ (East, North and West) with staff responsible for discrete types of work rather than responsible for work in a geographical area. This is a topic high on the Inspectorate’s agenda for future inspection work but needs time to bed in. However, it remains to be seen whether this new approach helps or exacerbates the problems we encountered in this report. Part of the philosophy of creating the Federations is moving the work rather than the people, gaining economies of scale and greater use of specialisation.

14. As part of a wider Scottish Government initiative ‘Making Justice Work’ the COPFS has, in partnership with other agencies, been involved in a case preparation review project consisting of four streams including summary case preparation. This was a work in progress at the time of completion of our report.

15. In 2008 COPFS issued its response to proposed changes in summary justice. It highlighted the fact that less than 8% of cases which called at an intermediate diet proceeded to trial – "We are preparing for trials that never take place".

16. It founded on the successful reforms in the High Court (following the Bonomy Report) and aimed to extend and build on that approach namely 'front loading' of work and early engagement with the defence.

17. Reform was to be about changing behaviours and cultures and identified a number of areas of concern namely –

    - Many defence lawyers not seeing their clients until the last minute
    - Expectations that Fiscals will adjust pleas at trials because of poor drafting of charges, poor case preparation and non-attendance of witnesses
    - Overloading of trial courts
    - The perception that Fiscals are never available to discuss cases with the defence
    - Fiscals not responding to correspondence or providing necessary information

18. As part of its contribution to reform COPFS would –

    - Have relevant material (such as CCTV) available as quickly as possible
    - Have staff, material and facilities at court to ensure that pleas could be resolved especially at non-trial diets
    - Ensure that witnesses were not cited unnecessarily
    - At an early stage indicate to the defence areas of evidence considered unlikely to be disputed
    - Contact the defence proactively to establish their state of preparation for trial and ensure there was nothing further they required
    - Ascertain from the defence before the intermediate diet what evidence could be agreed
    - Revise the forensic science protocol

19. These were very laudable aims and most found their way into internal guidance for use by staff.

20. Against this background of reports and legislation etc the main aim of this inspection was to get behind 'headline' figures and look in detail at Procurator Fiscal preparation of summary cases. The aim was to identify any practices by the COPFS which were contributing to 'churn'. As part of that exercise we separated issues which were due to third parties' failure to provide essential evidence or information to the prosecution from issues which could be described as attributable to the prosecution.

21. The hope was that by identifying the relevant factors which were within the control of the prosecution and contributing to churn that better ways of handling the work could be identified and improvements made.

CHAPTER 2 - METHODOLOGY

Aim

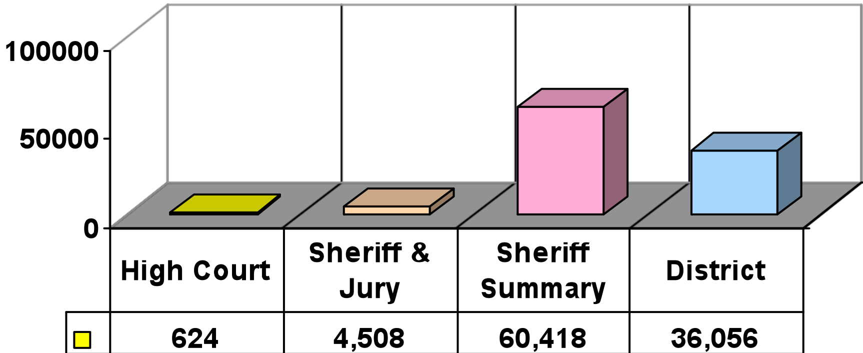
22. The aim of this inspection was to inspect the arrangements employed by COPFS staff (both legal and administrative staff) to prepare for intermediate diets and summary trials in light of the changes introduced by summary justice reform. This inspection focused on summary trial preparation in the Sheriff Courts in Scotland. (We excluded Justice of the Peace (JP) and Stipendiary Magistrates Courts from this particular exercise.)

Scope

23. The inspection examined 8 District Fiscal Offices around Scotland[1], spread over what was at the time the 11 Areas and now within the Federations. This gave a range of sizes based on Sheriff Court business for the year.

24. Figures provided by COPFS indicated that in period April 2011 to March 2012, 60,418 cases were dealt with in the Sheriff Court (includes the Stipendiary Magistrates Court in Glasgow). This represents 60% of all criminal court business.

Chart 1 – Sheriff Summary Business as % of all Court Business 2011/12[2]



Offices reviewed

25. Our approach was to examine a number of closed and completed cases in considerable detail and also observe a number of 'live' cases and their preparation at intermediate diet stage in all of the offices.

26. The number of closed and completed cases examined in detail was approximately 250, with a further sample subject to a review at the intermediate diet stage at a local court visit.

[1] Aberdeen, Alloa, Ayr, Edinburgh, Glasgow, Inverness, Paisley and Perth
[2] Source COPFS – total cases 101,606

Objectives

27. These were:

    - To assess the quality and timeliness of instruction by legal staff for trial preparation and any issues arising from findings.
    - To assess the quality and timeliness of action taken by administrative staff following upon the legal instructions provided.
    - To identify good practice – what does a well prepared summary case for trial look like?
    - To identify the common features of a 'churned' case and assess to what extent it could be said that quality or timeliness of Procurator Fiscal preparation contributed to that 'churn'.
    - To identify and promote good practice and make recommendations for improvement.

28. In addition to speaking to COPFS staff we contacted a wide range of criminal justice partners including –

    - The Police
    - Sheriff Clerks and Scottish Court Service
    - Defence solicitors
    - Forensic scientists
    - Sheriffs
    - Criminal Justice Co-ordinators

29. We are very grateful to all the people who gave so generously of their time. To compile the above list illustrates the extensive numbers of parties who go to make up the criminal justice system and who need to come together to make even the simplest summary trial possible.

30. For the case examination phase detailed questionnaires were prepared to enable data to be compiled and comparisons and issues identified. For the live case review cases were examined 'online' using the Crown Office IT system and meetings with the Sheriff and Sheriff Clerk sought after the court had finished. This was to discover, among other things, how representative the particular court day had been.

31. We did not specifically look at victim issues as we have already covered these in reports in conjunction with HM Inspectorate of Constabulary (Scotland) although some processes in relation to vulnerable witnesses were examined.

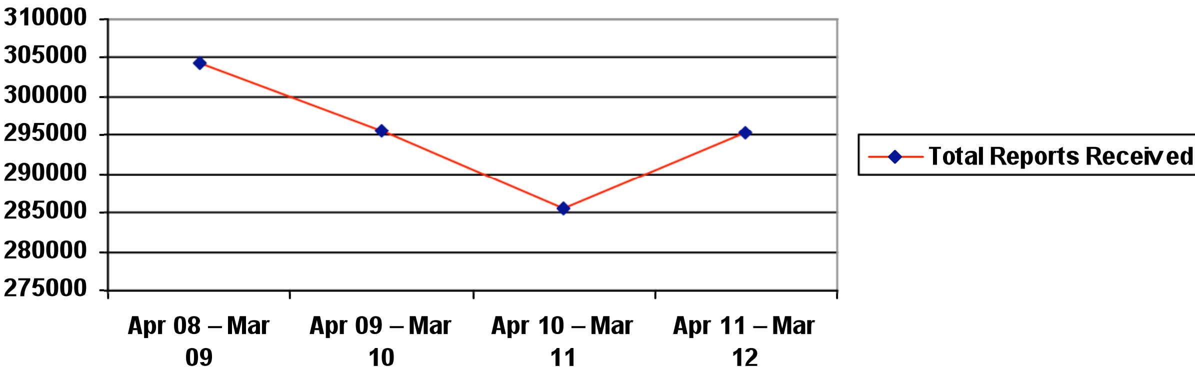
32. We cannot claim statistical relevance for our case reviews but they were detailed and extensive and we have no reason to suppose that they are not representative of the work as a whole.

CHAPTER 3 – CASE MARKING

33. One of the effects of summary justice reform has been the raising of thresholds for court action to be taken across the spectrum of options available to prosecutors. Increased use of alternatives to prosecution and changes to prosecution policy in relation to prosecution in the lower courts has meant a change in profile of the type of case now routinely prosecuted at Sheriff Summary level in courts around Scotland.

34. We observed a fairly consistent approach to decisions about appropriate forum with some slight variation in the Glasgow office where we found some quite serious cases prosecuted at summary level. We presume that to some extent this may be due to the existence of the Stipendiary Magistrates Court, where sentencing powers of magistrates are the same as that of Sheriffs, in effect creating an additional tier of prosecution options there. In any event, choice of forum was not part of our inspection and we simply comment to provide some context to our report.

Chart 2 - Reports Received - April 2008 to March 2012[3]:



COPFS statistics show that since 2008/09 there has been an overall drop of 3% in total reports received (304,441 in 2008/09 to 295,452 in 2011/12).

Targets

35. In order to comply with joint criminal justice targets, reporting agencies are required to submit 80% of their reports within 28 days of caution and charge.

36. Thereafter the COPFS target for 'take and implement' a decision (about whether and how to prosecute) is 75% within 4 weeks of receipt of the Standard Prosecution Report (SPR).

37. The 'Normand Report' in 2003[4] recommended that criminal justice organisations set targets for overarching performance across the criminal

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[3] Source COPFS
[4] Proposals for the Integration of Aims, Objectives and Targets in the Scottish Criminal Justice System

justice agencies. In particular, looking at the efficiency of cases dealt with in court, Normand recommended an -

"overall time target for the duration or 'lifespan' of detected criminal cases, whether summary, solemn or dealt with by alternatives to prosecution" [5]

38. Such a recommendation was implemented and, in respect of summary cases, there is a 26 week target of disposal of a case from caution and charge to the verdict in the case in 60% of prosecutions. Latest published figures on the COPFS website shows that this target was met comfortably.

39. As well as those 'standard' reports, COPFS receives more urgent reports regarding cases that must be dealt with more quickly. These are either -

Custody reports

40. These relate to those persons who have been kept in custody in terms of the criminal procedure legislation so that they must be brought to court on the next court day to face charges against them. Typically, therefore, these are persons charged with more serious offences (those likely to attract a prison sentence if convicted). These reports must be considered and marked by legal staff on the day of receipt to allow a case to be brought against the prisoner. These cases are therefore marked under quite urgent timeframes and pressures.

Undertaking reports

41. These relate to those persons whose offence comes within certain defined categories such as 'drink drivers', where a policy decision has been made that their prosecution will be fast tracked. Normally this means that the police release the accused who signs an undertaking promising to attend court at a specific date and time provided by the police at the point of liberation from police custody (normally within 28 days of liberation). Again as these reports are fast tracked they must also be marked within tight timescales and in any event before the specified court date provided to the accused.

The Standard Prosecution Report (SPR)

42. The development of Integration of Scottish Criminal Justice Information Systems (or ISCJIS for short) started in the 1990s and led to a standardised format for the reporting of cases electronically to the Procurator Fiscal. The format of electronic report, the Standard Prosecution Report or SPR was standardised in 2004. Aside from the police over 100 agencies report to COPFS. From 1 January 2006 they were all required to conform to the SPR format.

43. The current format as agreed between COPFS and police (and other agencies) is the SPR2[6]. This standard report should always contain, inter alia, draft charges for prosecutors to consider, a summary of the evidence,

[5] Paragraphs 10.16 – 10.23
[6] More fully described in the Summary Justice Reform SPR/SPR2 Business Rules 2008 – see www.copfs.gov.uk

an analysis of the evidence, a list of witnesses and a list of any productions seized by the reporting agency.

44. COPFS issues guidance to the police and specialist agencies outlining the technical requirements of the SPR2 format and quality standards expected in terms of the initial report and subsequent submission of statements and supporting material for trial preparation. These matters are covered in joint protocols[7] and detailed guidance notes[8].

Initial Case Processing (ICP) – the 'case marking' stage

45. As previously indicated, the submission of the SPR2 is done electronically and the initial case marking or decision making is also done by legal staff electronically, using an IT programme designed for the process called FOS (Future Office System).

46. The legal case marker must read the SPR2 in FOS, decide whether there is a sufficiency of evidence in law for prosecution, whether it is in the public interest to prosecute and should consider whether the case can be associated with other cases reported and 'rolled up' into one prosecution file. In addition the Fiscal prepares and revises the draft charges and creates the legal document called a 'complaint' containing the charges and a schedule of any previous convictions where applicable.

47. For custody cases the Fiscal also considers whether bail should be opposed and provides detailed instructions on this and other matters such as referral to Victim Information and Advice (VIA) for victim support and special measures for giving evidence, where appropriate. Less commonly issues arise about mental capacity, possible deportation considerations for foreign nationals, seizure of property in anticipation of forfeiture and other legal matters.

48. All of this work is carried out on a computer screen and the Fiscal must switch between different screen views to read and amend (where necessary) any charges proposed by the police and then open up a series of checklists to create the documents and case instructions for the case proceeding in court.

49. The creation of trial preparation instructions involves opening a separate 'checklist' from a range of checklist options about the first calling of the case and bail considerations. This is not a mandatory step and can be missed as we discovered in a few exceptional cases.

Trial preparation – initial legal instructions

50. At this stage of the process the current practice is that the Fiscal should assume that there will be a plea of not guilty and should provide a **full** set of instructions for the case preparation in the event of a trial. This 'front loading' practice was introduced many years ago in an effort to reduce the 'double-handling' of cases. Previously the practice was to mark in pen on

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[7] Protocol between ACPOS and COPFS for submission of reports

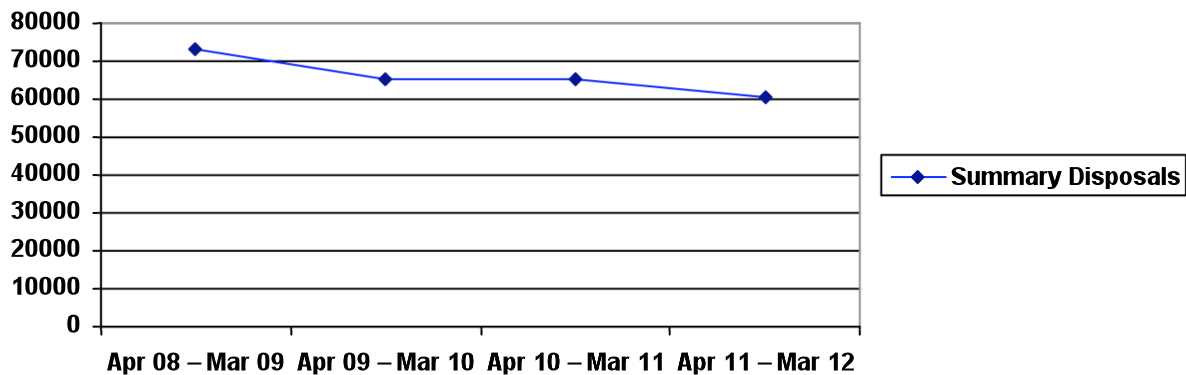
[8] Guidance to specialist reporting agencies such as Protocol between COPFS and SEPA 2006 – see www.copfs.gov.uk

the paper file any trial instructions only if and when a plea of not guilty was recorded. The theory behind this change was that the person marking the case should be satisfied as to legal sufficiency and therefore be in a good position to make a judgement about what witnesses would be needed and what additional material by way of productions were likely to be needed for the trial.

51. Detailed guidance is available on the COPFS Intranet for Fiscals outlining best practice in such trial preparation. We considered this guidance at each step of the process as we carried out our specific review of closed and live cases during our inspection.

52. Since the introduction of 'front loading' there has been a decrease in the number of cases being prosecuted (due to summary justice reform).

Chart 3 - Sheriff Summary Court Business - April 2008 to March 2012[9]:



53. COPFS statistics show that since April 2008 to March 2012 there has been an 18% drop in cases dealt with as summary business (73,372 in 2008/09 to 60,418 in 2011/12). This demonstrates a continuing downward trend as noted in the Scottish Government report 'Summary Justice Reform – System Performance, Monitoring and Evaluation' which was published in July 2009. We also looked at data relating to the offices we visited and noted a downward trend in all eight. We noted inconsistencies in data kept by different Criminal Justice System users as noted in the Audit Scotland report.

54. Nonetheless, the proportion of cases being reported by the police as 'custody' or 'undertaking' reports has increased[10]. Additionally, with advances in technology, many more cases have some kind of technical evidence such as audio, video, digital evidence or scientific or expert evidence. The proper instruction of such evidence is essential but we found it was not always done well.

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[9] Source COPFS

[10] See Scottish Government social research: 'Summary Justice Reform: Undertakings Evaluation, 2012'

55. In light of what we have said about the existence of so many reporting agencies and the variety of criminal conduct that the police report to COPFS it is difficult to provide an example of a 'typical' summary prosecution case. A 'one size fits all' approach to dealing with such prosecutions is not always appropriate, yet the systems and processes designed to deal with summary prosecutions are fairly standardised across the Service. It is our view that such an approach does not always serve the more complex cases very well.

56. We also observed that the number and variety of other considerations at the case marking stage, together with the fact that trial preparation is probably the least pressing concern (especially with custodies), **may** mean that less focus is given to trial preparation at this early stage.

Case review findings

Pre-trial instructions

57. The vast majority of cases had some trial preparation instructions. There were very few where there were no instructions at all. This was clearly an oversight which was generally picked up at an early stage and dealt with by administrative staff.

58. Where instructions were provided on the whole these were adequate and ensured that the necessary evidence was available for leading evidence at trial. We did find some instances of very good practice where the Fiscal marking the case had added helpful notes about case proof or matters that would need attention at a later stage down the line pre–trial and had anticipated the need for additional steps along the process.

59. Where there were no instructions at all we occasionally found some administrative action nonetheless. There were only a handful of these cases found overall and these omissions were very often picked up before any problems emerged.

Ordering full statements

60. There was almost universal appropriate requesting of full statements and, indeed, even where not instructed by Fiscals the administrative staff inevitably predicted the need for these and issued the request automatically. We are now aware of a proposed change in the administration process to make this an automatic step.

Marking witnesses for citation

61. In general we thought that the appropriate decisions were made about identifying the necessary witnesses to prove the charges.

62. In a small number of cases we took the view that the marking Fiscal had marked too few witnesses for citing. In one or two cases this was clearly down to simple error. In one of these cases the marking Fiscal had identified that a witness's evidence was probably capable of agreement

and instructed that a letter be issued to the defence to this effect. The witness should have been marked for citing meantime and cancelled in the event that the evidence was agreed.

63. We did, however, find more than a few instances of marking too many witnesses for citing. Possible reasons were:

- In some cases lack of clarity in the SPR as to what witnesses spoke to what aspects of the evidence.
- We speculated that marking cases under extreme time pressures might lead to over-citing on a 'better safe than sorry' basis.

64. It seemed that there was more of a propensity to over-cite police officers. This was a finding in every office we reviewed although there was some variation between offices as to the degree that this was an issue. We looked at possible reasons for over-citing and concluded that the following were likely reasons:

65. Often police witnesses whose only involvement in a case was that they took the statement of a civilian witness were cited for trial. In some instances this would be good practice where it was anticipated that the civilian witness may not speak up and might have to have their original statement 'put' to them in the witness box and the content of that statement proved by the evidence of the police officer who took it. However, we did encounter cases where there was nothing to suggest such a problem might arise and the officer was nonetheless marked for citing.

66. In this connection we took note of a recent 'practice note' issued by one Divisional Fiscal in Glasgow that attempted to address this problem. In an effort to reduce citing police officers in potential 'reluctant witness' cases it was agreed with Sheriffs that Procurators Fiscal would not routinely cite the police officer concerned. In the event that a witness was reluctant and the police officer then required the Fiscal would make a motion to adjourn the trial to have the police officer attend court.

67. Either lack of confidence or lack of knowledge of the law of evidence as to the need for corroboration of police interviews. We encountered a number of cases where two police officers were cited when their sole involvement in the case was in connection with a police interview. In law there would only be a need for the terms of the interview to be corroborated (that is spoken to by more than one witness) when the accused displayed 'special knowledge' about the crime. Where no such 'special knowledge' was displayed the terms of the interview could be adequately proved with one officer's evidence. Indeed, there were many instances where we thought that the terms of a police interview or reply to caution and charge were likely to be unchallenged and were ripe for potential agreement.

68. We spoke to legal managers in the offices we visited and learned that some internal case audit had been undertaken, either in the form of case audit on FOS or by way of the Department's 'self assessment' programme. We learned that over-citing of witnesses (especially police witnesses) was a common finding in these monitoring exercises. We also saw some

evidence of local training/awareness raising to address the issue which seemed nonetheless to persist. During the course of preparing this report COPFS suspended its ‘self assessment’ programme.

Ordering productions

69. In this section we talk about ‘productions’ as documentary items and ‘labels’ as ‘hard’ productions, such as weapons, clothing, tools, property since this is the way they are described in court proceedings.

70. Generally cases with productions and/or labels were less likely to proceed smoothly than those without. While for the most part they were ordered appropriately for trial there were some cases where the initial instructions were not specific enough. We looked at the following factors to find the root causes of the problems:

    1. SPR listing of productions
    2. Method of instruction
    3. Productions that would need specific instruction to obtain
    4. Multi-staged processes for some productions (Forensic/CCTV)
    5. The need to consider disclosure

1. SPR listing of productions

71. Procurators Fiscal rely on the police to accurately record the productions for a case, whether documentary or labels. We found that some police forces’ practice was to lodge at the initial case marking stage certain documentary productions, described as ‘case related documents’. These were not always recorded as productions on the SPR.

72. An additional matter of concern with ‘case related documents’ was that these were not always properly recorded in the Procurator Fiscal IT system as having been lodged at the Procurator Fiscal’s office and that could lead to some confusion later down the line.

73. We thought that some consistency of approach by all reporting agencies about the way certain documents were described and listed would assist Fiscals in their trial preparation instructions. This may be something on which to seek some standardisation when police forces merge into a single force in 2013.

74. Sometimes the list of productions and labels in the SPR did not include all the items mentioned in the summary of evidence. This was most common in relation to CCTV evidence which we deal with in greater detail below. Because of the method of instructing the lodging of the productions (or labels) these items are sometimes missed and not lodged.

2. Method of instruction

75. There are some ‘tick box’ options for certain types of productions commonly used in summary trials. The options cover many but not all of the productions needed. Aside from these specific options in FOS, there are two ‘blanket’ options which we found in our case review were the instructions most frequently selected. These are:

- Order immediate lodging of productions
- Order productions for court

76. The ‘blanket’ instructions would cover the items listed by the police in the SPR. However, if the document was not listed as a production by the reporting officer we found that these would not routinely be caught by the ‘blanket’ instruction relating to ‘all productions’.

77. The ‘blanket’ instructions make the distinction between those that were to be lodged at the Procurator Fiscal’s office straight away and those that were needed at court for trial.

78. In some instances the instruction to ‘lodge at court’ was inadequate for documentary productions. In our case review we found one or two examples of incomplete legal instruction about productions such as cheques or documents relating to frauds. We explain below how this is inadequate for disclosure purposes.

79. The option of ‘order productions for court’ might be more appropriate for ‘labels’ since storage of bulky items would pose some difficulties for many Procurator Fiscal offices. Occasionally we found an instruction that these items be lodged immediately with no obvious reason why this would be necessary. Again, apart from having the production to use to aid in the proof of the case at the trial, the Crown’s disclosure obligations have to be considered. We learned during a previous inspection (knife crime[11]) that some forces submitted photographs of knives or other weapons and Fiscals found such supplementary information useful for case marking (and disclosure).

80. We concluded that the tick box selection of a ‘blanket’ instruction for productions did not always suit the types of case being prepared. Best practice guidance suggests that in addition to ticking the box a note should be added to indicate which specific productions were being sought. We did not see any evidence of such specific instructions in our case review and thought that the ‘tick box’ format probably discourages such a bespoke approach, since the creation of a case note would be extra manual work by the Fiscal and certainly not an option for those cases with a large number of productions (of which we found many examples).

[11] Knife Crime Thematic, July 2011

81. Police force case management units told us that a blanket instruction to ‘lodge productions’ would immediately be referred to the police production keeper who would know nothing about the case and check the SPR for the list of ‘productions’. Some police case managers told us that Fiscals sometimes issued a request to lodge productions (either at the Procurator Fiscal’s office or at court) when there were no productions listed on the SPR, creating extra work for the police in checking this out. This was borne out in occasional cases reviewed.

82. Best practice guidance suggests that formal police documentation need only be disclosed to the defence on request (and so presumably not requested from the police unless asked for by the defence). However, in light of the recent appeal decision in *Cadder*[12] concerning the status of an accused person in police custody, the proof of legal status and provision of legal advice in custody has become increasingly important. We found in many of the cases we reviewed that formal police documents (such as detention, arrest or SARF[13] forms) were **not** ordered at this initial stage of trial preparation, either because they did not feature on the list of productions or because the Fiscal did not ‘tick’ the specific box to request the named document from the separate suite of options. Indeed we found numerous examples of ‘SARF’ forms being requested later down the line when the initial request to ‘lodge productions’ meant that these formal documents were missed because they had not been listed on the SPR.

83. As reported by us previously (in Area inspection reports and Victim thematics) productions can present a real problem for the police, particularly in terms of storage and instructions for return. A method of providing Fiscals with the opportunity to give separate instructions per item listed could prompt earlier instructions to the police to return to owners where the property seized is of no value to the prosecution case. Sometimes an instruction to photograph before return or to return meantime and obtain an undertaking to produce at the trial can assist if there is doubt about an item’s usefulness.

RECOMMENDATION 1

We recommend revision of the method of requesting productions on FOS to enable a tick box option against each listed production in the SPR.

84. This would mirror the way in which witnesses are selected for citation. Such an approach may be more time consuming (particularly in cases with large numbers of productions) but would, in our view, cut down on the confusion about what is to happen to productions that currently exists.

85. It was also stressed to us by police forces that they needed to know not only **what** productions were needed but also **where** they were to be taken. This was especially important for larger Procurator Fiscal’s offices where complicated arrangements for productions were in place depending on the nature of the case and the type of production. For example, in one office

[12] Cadder v HMA 2010 SLT 1125
[13] Solicitor Access Record Form

Police Interview tapes were to be lodged in a different part of the office from CCTV discs which differed from documentary productions. If the instructions were not clear enough then the receipt and recording of such by Fiscal Office staff could be prejudiced.

86. Lastly, lack of instruction for medical records cropped up in one or two cases where there was an instruction to cite a doctor to speak about injuries without an instruction to also obtain medical records to which the doctor would need to refer in court.

3. Productions that would need specific instruction to obtain

87. A particularly common problem in custody reports related to productions or labels that officers were simply not able to seize before they finished their shift and submitted the SPR. Some reports referred to, for example, the existence of CCTV evidence and either advised it was still to be obtained or sought specific instructions as to whether this ought to be pursued and obtained.

88. All too often in such circumstances there was a confusing situation where the Procurator Fiscal simply issued the ‘blanket’ instruction for ‘all productions’. This did not give the required direction to seize the item concerned and evidence was sometimes lost as a result of the poor communication.

89. Again, we thought that a revised format for ordering productions individually could solve this problem. It would be clearer to Fiscals that the police had yet to seize the item if it was not listed and ought to prompt Fiscals to issue a specific instruction to seize the item concerned.

4. Multi-staged processes for some productions (Forensic/CCTV)

90. One aspect of a pre–loaded case preparation instruction format is that it does not always lend itself to multi-stage processes unless the stages are set out clearly. In cases where ‘multiple stage’ instructions were appropriate we found that the necessary instructions were given for only the first step and rarely (at the initial case marking) for the later steps needed. FOS does not offer the option for ‘follow up’ steps. These have to be added in manually by Fiscals and were often missing from the instructions.

91. These issues were especially common in relation to forensic and CCTV evidence:

- Forensic analysis

92. In some cases forensic work is undertaken before the police report is submitted. More often than not, however, no work is undertaken unless and until a Procurator Fiscal instruction is received by the laboratory. The appropriate time for such work to be undertaken would be on a plea of not guilty.

93. Where a scientific analysis is required a pro-forma application to the Scottish Police Services Authority (SPSA) must be prepared for the analysis to be carried out. In some offices local practice is that legal staff provide an outline of the instruction but leave administrative staff to carry out the form-filling whereas In other offices legal staff complete the full pro-forma detailing exactly what should be examined by the scientists and why.

94. Generally we found that the initial legal instruction, whether on a completed form or by way of notes followed later by administrative staff, appeared to be adequate.

95. Beyond the initial instruction for the analysis to take place we saw very little evidence of any instruction as to what should happen on receipt of the forensic report. There are formal evidential provisions in the criminal procedure legislation allowing for such reports to be admitted to evidence without the necessity of leading oral evidence from the scientists who carried out the analysis. For these evidential provisions to apply a copy of the report must be served on the accused at least 14 days prior to the trial. In our case review we found **some** instances of instructions to follow up on receipt of the report with instructions for service on the accused to allow for these evidential provisions to come into play. These, however, seemed to be the exception rather than the rule. We also expected to see instructions for the drugs or whatever was analysed to be lodged for court and again such follow up instructions were often absent.

96. In addition, in drugs trials where the allegation was of ‘dealing’ in drugs rather than the offence of simple ‘possession’, the Crown frequently relied on expert evidence from an experienced drugs squad officer. These are commonly referred to as ‘**st**atement of **op**inion’ reports (or ‘STOP’ reports for short). Again, at the initial marking stage we found that not all cases contained the necessary follow up instructions on receipt of the forensic report to obtain such an expert opinion.

97. Some administrative staff did not seem to need additional instructions to carry out these extra steps themselves whereas in other offices the administrative staff would not know to do this and relied on step by step instructions. Local practices differed quite significantly in relation to the minute detail of how certain productions were ordered and how they dealt with them, in terms of record keeping of receipt, storage, service on the accused where applicable and any further action needed.

- CCTV

98. The explosion in the use of CCTV in both public places and in private settings has provided challenges for those in the criminal justice system in making the best use of such evidence in the context of criminal prosecution.

99. Again we noted that local practices and procedures differed quite widely between police forces. We were told that where the CCTV footage was captured on a ‘public space’ CCTV system operated by a local authority then police usually had little difficulty in obtaining access to the CCTV and obtaining the necessary copy of the footage.

100. We spoke to police officers in case management units in a number of police forces across the country. In Grampian, Lothian and Borders, Central and Tayside there were new arrangements in place or about to come into place for some CCTV footage to be lodged with the Procurator Fiscal's office at the time of submission of the SPR. In some instances police forces were trying to provide CCTV footage at the outset even with custody reports. Some courts provided viewing facilities 'in-house' for this.

101. In Strathclyde police force area (which was the force reporting to Procurator Fiscal offices in Glasgow, Paisley and Ayr) a protocol was agreed between police and COPFS for delivery of CCTV only on instruction by the Procurator Fiscal. The timeframes were dependent on the type of case. For summary cases where the accused was at liberty (either on bail or ordained to appear) delivery was to be within 14 days of request; for custody trials, within 48 hours of request.

102. We were advised that, even where CCTV had been lodged at the outset, there were such time constraints on legal staff marking cases that very few in practice would view at that stage. This was particularly so where the case was reported as a custody case. Much would depend on information in the report about what it was likely to show and how crucial it was to the proof of the case or the decision as to appropriate forum although we did find one case with a very helpful note to the effect that the CCTV had been viewed.

103. We heard that some forces were moving towards providing a fuller description of what the CCTV footage showed with precise information about timing on the footage, a description of the action shown and comment on the quality of the images which was welcomed by Fiscals. However, we also heard comments from some officers that due to their time constraints it was not always possible to provide such detailed information for custody reports.

104. Where not lodged with the initial police report the marking Fiscal would require to instruct that CCTV evidence be lodged. Here again local practice as to how this instruction was given varied. In Glasgow, for example, marking Fiscals completed a pro-forma document (similar to a forensic analysis request form) and submitted it to the Digital Forensics Unit of Strathclyde police as part of their case preparation at the marking stage. The instructions were to reformat the footage (copy onto another disc to play on the equipment available in court) or to simply lodge at the Procurator Fiscal's office along with a copy (or copies - depending on the number of accused) for disclosure purposes.

105. In the other offices we inspected the Fiscal marking the case would simply tick the option to 'order video tapes [and any certificates]'.

106. Additionally Fiscals should tick the option to order a certificate to cover the evidence of a CCTV operator, which would be of a formal nature, to be led without necessity of calling him to give evidence about the provenance of the footage. Again, as with the evidential provisions about forensic reports, we expected to see a further instruction that the certificate had to be

served on the accused on receipt. In case review there was scant evidence of such follow up instructions.

5. The need to consider disclosure

107. The 'front loading' of trial preparation at the initial case marking stage was introduced many years ago, long before the Crown's obligations for disclosure became law in 2005. It was always good practice to prepare well in advance of the trial and to engage early with the defence where it appeared that issues were likely to resolve on presentation to the defence of certain evidence.

108. Good practice guidance advises that productions should be available for disclosure to the defence at an early stage, even as early as the pleading diet (first calling of the case). In practice the Crown always provides the defence with a summary of evidence on which the prosecution is based at the first calling. With the exception of the initiatives we have already described about getting CCTV from the police at an early stage, proactive disclosure of anything else at this early stage was rare.

109. Overall there seemed to be a lack of anticipation about what would be needed. In particular in those cases where the instruction to 'lodge productions at court' was given this would provide no facility for the Crown to copy the productions to the defence. In one case involving forgery and uttering of prescriptions, the instruction to 'lodge productions at court' meant that the prescriptions were not lodged with the Procurator Fiscal and not disclosed to the defence at an early stage.

110. Even where the production was unlikely to assist either party at trial, for example some CCTV footage which was neutral, there was sometimes a lack of anticipation of what the defence would need disclosed before engaging in meaningful discussions about the case. We thought that more could be done to anticipate the need for disclosure at the stage of ordering productions.

111. For 'labels' best practice guidance advises that the defence should be advised of the whereabouts of the items together with the name of a point of contact to make arrangements to view them. We found no evidence that this guidance was being followed in any of the Procurator Fiscal's offices we visited. Instead the practice seems to be to wait for the defence to ask to view an item. We thought that this could also be remedied at the marking stage with a more bespoke approach to each production with a decision to either have the item lodged at the Procurator Fiscal's office and copied for disclosure or an instruction to offer the defence viewing facilities at the police station (or elsewhere) and lodge at court for the trial.

Interpreters

112. Where Crown witnesses need an interpreter in order to give evidence in court it is up to the Crown to request an appropriate interpreter to attend the trial. The Crown rely completely on the police or other reporting agency

to provide the information about language needs in the first place. We checked the files we reviewed for evidence that this practice rule was being followed. We found very few cases where this situation arose but where it did we found good compliance.

113. In terms of administrative action we could not find any record keeping on the IT system to confirm that the interpreter had in fact been asked to attend, although neither did we note any adjournments for lack of interpreting services so assume the interpreters were indeed requested to attend. It would be good practice for copies of the instruction to be saved on the case file on the IT system. We covered these issues in earlier reports on every office in the country in relation to race issues.

Instructing further enquiries about the case

114. In some cases further enquiries were instructed at the time the decision was made to prosecute. Inevitably the response to such enquiries would involve some further consideration by the Procurator Fiscal, whether in respect of additional witnesses to be cited, productions to be seized or viewed or at least to rule out any further work.

115. Here we observed some pockets of good practice where the Fiscal issued thorough instructions to the police or other reporting agency as to what additional information was needed and included a note to administrative staff to bring up the papers to a legal member of staff to cite anticipated additional witnesses or take further necessary steps. However, there were cases where such good practice was lacking. We found instances where additional instructions were properly given but without the necessary follow up instructions to ensure that case was reviewed by a legal member of staff and further necessary action taken.

116. One of the most common instructions for further action was where it was anticipated a (vulnerable or child) witness would give evidence in court with special measures such as behind a screen or in a remote site via CCTV to the court. Use of such measures means that the witness is unable to point to the accused in the dock and where identification is essential from that witness it is necessary to have identification proved by other means. Here an identification parade is often needed to establish proof of the identity of the accused.

117. There were two frequent flaws in the way legal instruction was provided in these types of cases:

- We found in some instances that the instruction was too vague for administrative staff to action so was left undone.
- Cases where the instruction was issued to the police appropriately had no follow up instruction to diary for receipt of the report of the identification parade and either to cite the additional witnesses needed to prove the essential matter of identity or to make arrangements to serve a copy of the identification parade report on the accused to take advantage of routine evidence provisions about its proof.

118. It seemed that, in the absence of a ‘bring up’ instruction for follow up work, complete reliance was placed on the next scheduled legal review. As we describe later this would be when the case was being prepared for intermediate diet. If that review was very near to the intermediate diet (often only a day before) then there was too little time for a proper review of the evidence and follow up work can be missed. We picked up at our live Intermediate diet observations that identification parades were often still to be held, or if held, the reports about the procedure and findings were yet to arrive.

Diary system

119. We expected to see some mechanism in place to ensure that progress on the further enquiry was monitored by way of a diary entry (‘bring up’) to have the case reviewed in light of the reply. There is a mechanism available on the IT system to create a diary entry or ‘bring up’. We examined the IT records for the cases we reviewed. It was common to find that administrative staff used a diary system to ensure that ‘bring ups’ were used to check progress of full statement requests, citation of witnesses, but **NOT** for requests for productions (including CCTV, forensic reports as well as the standard request to ‘order immediate lodging of productions’) or for further enquires such as identification parades.

120. Given that there is such a mechanism available ‘bring up’ instructions should be part of the legal case preparation.

RECOMMENDATION 2

In situations where action is required in various stages such as obtaining and serving forensic reports, CCTV evidence, identification parades etc the Fiscal should instruct a diary entry on FOS and clear instructions as to the follow up stages needed. Ways of achieving this more easily on the IT system should be explored.

Evidence capable of agreement

121. Another of the McInnes committee’s recommendations was to restrict the number of witnesses attending and giving evidence at a trial to those essential and contentious. Three provisions of the Criminal Procedure (Scotland) Act 1995 deal with evidence not in dispute:

122. Section 256 – describing how admissions and agreements by one side are taken as agreed and proved without the necessity of leading evidence to prove them.

123. Section 257 – the **duty** on **both** sides in a criminal case to identify facts that are unlikely to be undisputed by the other party and in proof of which there is no desire to lead oral evidence. Both sides should seek to ensure that the facts are identified AND steps taken to agree are both carried out before the intermediate diet (more of which later).

124. Section 258 – the option to serve a statement of uncontroversial evidence on the other side where facts are likely to be undisputed by way of a formal notice served on and open to challenge by the other party (which challenge can, in certain situations, be overruled by the court).

125. Best practice guidance for case marking stresses the importance of prosecutors identifying any evidence capable of agreement at the marking stage but does not make clear **how** this evidence should be dealt with once so identified.

126. During our case review we observed two different methods used by marking Fiscals to indicate likely evidence for agreement:

- By ticking the 'EA' box at the side of the witness's name. 'EA' stands for 'evidence agreed'. This is misleading since, at the marking stage no approach has been made to the defence and therefore no evidence **actually** agreed. Where this method was used it simply recorded the view of the Fiscal depute but would not result in any action being taken by administrative staff to seek agreement.
- By ticking the option 'send s257 letter re witnesses (specify)'. Where this option was ticked then administrative staff should send a style letter to the defence. We only saw this being used in a couple of cases in one office reviewed and we wondered whether administrative staff were clear enough about the instruction since they did not action the instruction. Furthermore in one of these cases the Fiscal had failed to cite the witness in the first place so that, if not agreed, the evidence of the witness would be lost.

127. We found no use of the provisions of section 258 about statements of uncontroversial evidence.

128. In custody cases, particularly where there were child or vulnerable witnesses, we found a number of cases with notes for the Fiscal taking the first calling of the case to seek agreement about the identity of the accused so that special measures could be adopted (without the necessity of holding an identity parade to establish this). This was good practice. However, there was rarely a follow up instruction as to how to proceed in the absence of such agreement. Reliance was placed on verbal requests during the court hearing rather than use of the formal evidential provisions that would achieve the same result such as letters seeking agreement (s257) or statements of uncontroversial evidence (s258).

129. We thought that the host of other more pressing considerations required of Fiscals were such that the agreement of evidence was less likely to be the focus at the case marking stage. We describe in Chapter 6 how we believe that a more thorough case review is needed than is presently carried out in most of the offices we visited. We did wonder if by then a more focused approach to agreement, at a time when full statements, productions, CCTV **OUGHT** to be available might present a better opportunity to have that kind of 'trial' focus.

130. We therefore conclude that whilst identifying evidence capable of agreement is a worthy aim at case marking, in practice it is rarely done. Where the Fiscal is able to so identify evidence there should be one uniform method of alerting the defence of this at the earliest opportunity. We found that this was not achieved in practice in the cases we reviewed.

RECOMMENDATION 3

For clarity at the marking stage use should be made of only one method of suggesting to the defence what evidence could be agreed.

Reduction to summary

131. Until now we have focused on the cases that were marked at the outset for summary proceedings. Where proceedings are commenced on petition for solemn procedure (before a jury) there are times when, on review, the case is reduced to summary level. Very often the case will be reduced to summary after a review of the full statements, productions, and in some cases review of further enquiries such as forensic analysis, identification parade results or other matters. The information about the case in the Crown's possession is often much fuller than those cases initiated for summary proceedings based only on a summary of evidence provided by the police.

132. The Fiscal making that decision must create full instructions for the trial preparation as we have previously described. Where we reviewed cases in this category we noted that all the instructions about trial preparation were in handwritten notes on the 'backing sheet' of the papers, rather than in FOS. This was the practice at the time.

133. Despite having fuller information we found that such cases did not always fare any better in the system than those simply initiated from a summary of evidence. We picked up a couple of instances where we thought that better consideration of the evidence at the reduction stage and where the information was to hand, fuller disclosure at the time of reduction to summary might significantly reduce the problems encountered later with these cases.

134. Legal staff told us that there could be something of a 'silo' mentality between the solemn and summary units (especially in the larger offices). For the solemn team there are tensions between dealing with more serious offences in their own unit and taking the time needed to provide the necessary quality of case instructions for summary proceedings. This may well become more of an issue as different types of case work are spread over different geographical offices around the country under new 'federal' structures in COPFS.

135. We looked for operational guidance as to how to deal with cases that were reduced to summary and could find no specific guidance, either in the general case marking guidance or in the best practice guidance for summary casework. We considered that guidance might be helpful as to allocation of responsibility for the trial preparation instruction.

136. We also thought that revision of the letters to agents advising of the reduction to summary to include copies of whatever statements and productions were at that stage available for disclosure might all go some way to effectively progressing these types of cases. As we have said, all of this takes some time especially with complex cases that involve a number of accused or witnesses or productions.

137. Most of the cases reduced to summary did at least have an appropriate instruction that the case merited some advance preparation.

RECOMMENDATION 4

We recommend the creation of guidance in relation to reduction to summary clarifying what and by whom trial preparation is instructed.

Advance preparation

138. As we outlined earlier the seriousness and complexity of summary case work in the Sheriff Court has increased in recent years. There is no standard summary case. It has long been accepted as good practice that some more complex cases are allocated to a legal member of staff in advance of the trial for additional preparation over and above what might be considered 'standard' trial preparation. In recognition of this there is an option for Fiscals to highlight the case for 'advance preparation'.

139. In our case review we found that for the most part cases were being appropriately identified as needing some extra preparation. However, it was entirely another matter whether and to what extent that 'advance preparation' was actually carried out as we discuss later in this report.

Acceptable plea

140. Plea negotiation has been an accepted and long-standing practice in all courts in Scotland. A pragmatic view that efforts should be made to have the case resolved effectively at the earliest opportunity without the necessity of proceeding to trial is one on which summary justice reform is based. Indeed without it the system would long since have collapsed.

141. One element of the new approach by the Crown in summary justice reform was the introduction of the practice of intimating to the defence at the earliest opportunity the 'acceptable plea' position, effectively advance intimation of the 'bottom line' in any plea negotiation. The aim was to reduce the number of late pleas at trial and encourage an earlier focus where resolution without a trial was likely. The acceptable plea letter makes it clear that the plea on offer – if not 'guilty as libelled' – is only open for acceptance until the intermediate diet. The Crown's policy is that by the time of the trial diet the reduced offer should be refused except in limited circumstances, where for example there has been a material change in circumstances.

142. In 2010 acceptable plea letters were the subject of an appeal and the court (Lord Hardie) commented:

> "It might appear anomalous that a procurator fiscal depute should determine that it is in the public interest to take proceedings against an accused in respect of several charges while simultaneously advising the accused through his solicitor that he will not insist upon these proceedings, insofar as they relate to certain specified charges, provided the accused pleads guilty to other charges on or before a specified date. However the public interest in any particular situation doubtless involves the Lord Advocate or procurator fiscal balancing different considerations."[14]

143. Best practice guidance advises that the position should be considered by the Fiscal, based on the state of evidence in the case from the initial police report, whether that is a guilty plea as libelled or some lesser adjustment to the charges libelled. The 'acceptable plea' position should be recorded by the Fiscal in the court instructions in FOS as well as in a letter for the defence drafted by the Fiscal and issued to the defence at first calling.

144. In terms of the processes involved we found that whilst most of the cases reviewed did have an acceptable plea letter in the case there was not always a corresponding note on the case instructions to this effect. The absence of a case note on the paper file could present a difficulty for the Fiscal in court.

145. In one or two isolated incidents we encountered discrepancies between what the acceptable plea letter stated as opposed to the recorded note by the Fiscal, also presenting potential difficulties.

146. Leaving aside the processes, however, we encountered strongly held views on the use of acceptable plea letter expressed to us by various parties.

147. Legal staff with whom we consulted ranged from the very experienced to some newer members of staff. It was almost universally agreed that the discipline of having to consider an acceptable plea position at the outset helped to focus on what might be a satisfactory outcome of the prosecution.

148. For less experienced staff it was thought that having a note from a more experienced colleague who marked the case as to the acceptable plea position was helpful.

149. The consensus view from legal managers with whom we consulted was that it was likely to be of most assistance to a Fiscal in a busy custody court where there was little time to read the papers in advance but that it was not always necessary. It was a good idea in principle but had some drawbacks in practice.

[14] MacDonald v McGowan [2010] HCJAC 36

150. Sometimes it was difficult at the marking stage to be confident of a 'bottom line' and since the letter is binding on the Crown some Fiscals worried that they would prejudice the Crown's position by setting out too weak a plea at the outset. Many opted for the safe option of 'guilty as libelled'.

151. In our case review we thought that some acceptable pleas could be described as 'unrealistic' and could be counter-productive to early effective resolution.

152. From a defence perspective we were told by one agent that he considered them a complete waste of time – "not worth the paper they are written on" – and invariably threw them in the bin. Another agent in the same jurisdiction thought it was useful to know the Crown's position at custody hearings. Others thought that they were used by less experienced Fiscals in court as an excuse for avoiding meaningful discussions.

153. The efficacy of the acceptable plea offer is dependent on the attitude of the defence. Some Fiscals bemoaned the fact that defence agents either completely ignored the acceptable plea letter or took the acceptable plea position as the starting point for negotiation. It was felt that the Crown were simply 'lowering the bar' at the outset in summary cases and there was doubt as to whether the early offer on the table from the Crown did achieve its intended aim.

154. A number of defence agents commented that a named contact and telephone/email address in order to facilitate discussions would be helpful. We have seen local guidance in some offices to the effect that Fiscals should provide a contact name and number on the 'acceptable plea' letter. We did not notice any examples of such information being provided (although we were not specifically looking for this) but we did note that the terms of the template for 'acceptable plea' letter available in the IT system was not set out in terms to provide such information and would require to be manually amended. We address the matter of communication between defence and Fiscals later in Chapter 6.

155. Many agents complained of a perceived lack of discretion, particularly in cases where there was a firm prosecution policy such as in domestic abuse and racially motivated crime (both policies which the Inspectorate in other reports has strongly supported). They told us that they preferred to have a discussion with a Fiscal who was willing and able to take a decision based on the evidence available and that Fiscals should use their discretion rather than feeling tied to an apparently inflexible position to which they appeared to be constrained to adhere.

156. We conclude therefore that this innovation by the Crown has had mixed results. Internal communication of an acceptable 'bottom line' between Fiscals seems to be a helpful addition to the case notes. However, there is less evidence that communication of that position to the defence at the outset actually promotes the early case resolution it is intended to achieve and in some cases, we suggest, may have the opposite effect.

RECOMMENDATION 5

We recommend that the Acceptable Plea position be retained but only 'in-house'.

Case audit

157. Before we leave this chapter on initial case marking we should mention the facility to audit cases at the initial case marking step by use of an audit tool in the FOS IT system.

158. We canvassed views from some of the legal managers around the country about their practice in reviewing cases at audit. There were differing approaches. A couple of managers indicated to us that it was their practice to review the choice of forum and check that the charges were properly drafted in FOS audit but would not look at the instructions for trial preparation at this audit. Others claimed to review **all** aspects of the marking work including the trial preparation work. In one office we learned that FOS auditing was not being undertaken at all due to the resource intensive nature of this monitoring. It was impossible to tell from the IT system, even where the audit had clearly taken place, to what extent the case preparation element had been reviewed.

159. In line with Government policy COPFS introduced a form of self assessment. This was limited to examining certain aspects of case work and was drawn up by the Strategy and Delivery Division (SDD). The practice was to carry out 10 monthly audits every year and embedded as a standard job objective of legal managers and to take effect from May 2010. It has since been suspended. It should have been operating in the 8 offices we visited at that time. One office had done none, in another only one month had been attempted and in the other 6 there was at best partial attempts at completing this. We understand COPFS is considering its position in the context of Federation working.

160. This meant that apart from the FOS auditing referred to above little was done to monitor performance issues and learn lessons.

RECOMMENDATION 6

We recommend more robust FOS audits be carried out to include trial preparation instruction.

CHAPTER 4 – PLEADING DIET

161. After the process of 'case marking' a complaint is prepared and the case calls in court for the first time. Other than those appearing from custody the accused may answer a complaint at a pleading diet to which they are cited to attend or by responding to an undertaking to attend.

162. Accompanying the complaint is a 'disclosable' summary of evidence taken from the SPR.

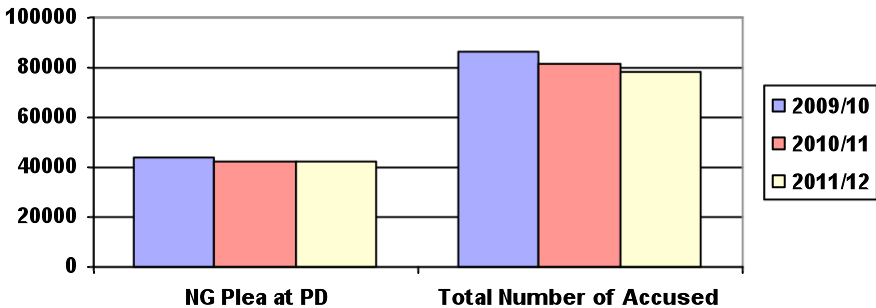
163. On first appearance the accused is asked how they plead to the charge(s) on the complaint. If a plea of guilty is tendered at the outset then the matter can be dealt with there and then although the sheriff may call for background reports before sentencing. These cases did not form any part of our inspection.

164. Where the accused has not appeared, has not replied to his citation by letter or where (either the Crown or) the defence want to continue the case before a plea is tendered for further enquiry the case may be 'continued without plea'.

165. Crown Best Practice Guidance encourages Fiscals to ask the court to continue without plea a case where it is believed that the case is capable of resolution, even where an intimation by a defence solicitor advises that the accused wishes to plead 'not guilty'. We heard of some instances where this practice was used to good effect when CCTV evidence was thought to be central to the case it was then disclosed to the defence and the case was resolved without the necessity of fixing a date for trial. This was wholly dependent on the Crown making an early request for such information or being provided with this at the outset. We heard from some police forces that they were trying to lodge some CCTV footage along with police reports to support such early engagement.

166. We did not look at cases that resolved at this early stage since our focus was on those cases where a plea of not guilty was tendered by the accused and dates were fixed by the court for intermediate diet and trial diet.

Chart 4 – Not Guilty Plea at Pleading Diet - April 2009 to March 2012[15]:



[15] Source Scottish Court Service

167. SCS statistics show that in 2009/10 51% of new cases[16] resulted in not guilty pleas. This increased slightly to 52% in 2010/11 and 54% in 2011/12[17]. We also looked at data for year April 2011 to March 2012 relating to the eight offices we visited during our inspection and noted variations in results of not guilty pleas from 51% in Alloa to 72% in Inverness.

168. When there is a plea of not guilty the Sheriff Clerk must fix two dates for the accused to attend: intermediate and trial diet. Where the sheriff decides that the accused must be remanded in custody to await trial then the trial must commence within 40 days of first appearance. Any intermediate diet must be fixed for a date before that trial date (normally a week or so before). Where the accused is at liberty pending trial the delay between the first calling and the trial depends on the date provided by the Sheriff Clerk of the court.

169. Procurators Fiscal do have some limited input into the selection of dates for trial. We heard of good practice in advising the court of the need for early diets for cases involving child witnesses or domestic cases. In some jurisdictions we were aware of moves for information about police witness availability to be communicated directly to the Sheriff Clerk so that dates unsuitable to police witnesses in the case could be avoided in setting a date for trial. We should add that in our case review police reports showed no information-gathering from civilian witnesses about their availability. This may be something to be considered for the future as the attendance of witnesses at trial is a common reason for 'churn' at trials.

RECOMMENDATION 7

We recommend discussions take place with ACPOS to encourage more recording of civilian witness availability.

170. Sheriff Clerks must try to balance the different needs of the whole court business in their Sheriffdom and this includes the demands for solemn criminal business and civil business. In addition they are subject to their own end to end target for summary business of 20 weeks from first calling of the case to final resolution.

171. As part of 'Making Justice Work' the court service are looking at court programming with the aid of a simulation toolkit.

172. The average number of weeks between pleading diet and trial diet is monitored by the Scottish Court Service and varies from office to office. The following table[18] shows the average period in weeks as at 31 March 2012:

[16] Counted as related number of accused
[17] (43,846 42,720 and 42,519 compared with 86,415 81,717 and 78,184 respectfully)
[18] Source – Scottish Court Service

Table 1

Period in weeks from Pleading Diet to Trial Diet at March 2012	
Aberdeen	21
Alloa	19
Ayr	12
Edinburgh	16
Glasgow	13
Inverness	13
Paisley	16
Perth	16
National	**14**

173. The above figures show that there are varying average periods between pleading diet and trial diet throughout the country with a national average of 14 weeks. These figures include custody trials where the lapsed time is shorter.

174. Our inspection findings were that such periods varied enormously between courts. In a couple of instances there were trial delays in Aberdeen and Edinburgh Sheriff Courts of more than 30 weeks. Periods of 15–20 weeks were fairly common in a number of courts in the cases we looked at. (It should be noted that our case review selection was taken from cases closed in the months between July and December 2011, so the periods are in some cases fairly historical. Nevertheless the figures illustrate the ever changing landscape in which the cases were being prepared for trial). For custody trials the period was usually 4/5 weeks with an intermediate diet a week or 10 days before trial.

175. We noticed that in Glasgow, Paisley and Edinburgh in the cases we reviewed the gap between intermediate and trial was generally 2 weeks. In the other jurisdictions there was usually a 4 week gap. Best Practice Guidance advises that a period of 4 weeks between intermediate and trial diet is preferable. In those offices where a 2 week period is used this leaves little room to rectify any defects.

176. Long periods between pleading diet and trial diet could impact on witnesses remembering to attend and remembering the events to which they were cited to give evidence (see below at ‘Citing Witnesses’). Short periods would impact on time available for staff to request, receive and deal with further information, documents, etc. This combined with delays in updating cases left little time to follow process eg disclose all relevant material, etc, in time for the intermediate diet.

177. Custody cases have an obvious impact in that there was always less time to deal with business.

178. There is no system for legal review of the case after first calling. The whole ethos of 'front loading' was that the Fiscals calling these cases in court would be entitled to expect that the initial case preparation instructions by the Fiscal would be complete. We found little evidence of any additional instructions to complement the original marking instructions on the files we reviewed.

179. Even with the front loading system there are still situations where a review of the trial preparation instruction is necessary eg where a partial plea was tendered; where separate trials are fixed for different accused on the same complaint or where one of a number of accused pleads guilty at the outset. We found some instances where this legal review should have taken place but did not happen and some over-citing of witnesses resulted. Again these instances were fairly rare but highlight the need for constant review to be considered by legal staff.

CHAPTER 5 – ADMINISTRATIVE TRIAL PREPARATION

180. Support staff had the benefit of best practice guidance in the form of a Case Processing Manual and the Disclosure Manual and we learned from staff with whom we consulted at each office that these were of assistance and were supplemented by local desk instructions in 6 of the 8 offices we visited.

181. These manuals detail and describe processes for administrative staff to follow in relation to summary work. All staff advised that they were aware of the guidelines and the targets therein, that they had access to them and that they would refer to them if there was a need.

182. In offices where desk instructions were no longer used this was because they were out of date or, following restructuring in the office, it was discovered that there were a variety of working methods used.

183. Staff in each office told us training tended to be 'on the job' and through attending appropriate courses. The majority of staff felt training to be adequate although some felt it was not enough. All staff indicated that they worked well with each other and could share knowledge and experience.

184. Guidelines, desk instructions and training all provide for points of reference and information on how to process business and have an impact on how well staff could perform their duties. Desk instructions were particularly helpful in ensuring efficiency and continuity especially if someone new took up post therefore we recommend that where there are no desk instructions they should be updated or created and maintained to reflect the duties of each desk.

RECOMMENDATION 8

Desk instructions should, if not available, be created and updated regularly.

Court updates

185. When a plea of 'not guilty' is tendered the papers must be returned to the office for administrative staff to 'action' all of the legal instructions. The Sheriff Clerk fixes dates for intermediate and trial diets and updates the court minutes. This is automatically transferred through ISCJIS to the COPFS IT system.

186. The time taken for files to be transported from court back to office varied depending on the distance of the office from the court building. Those offices located at or beside the courts benefited from this geographical advantage, particularly where instructions had to be implemented quickly.

187. All staff indicated that on return from court work was prioritised and split into categories with urgent cases eg custodies taking priority and we found this seemed to be borne out in our case review.

188. All offices advised that checks were carried out to ensure that the handwritten minutes from the Fiscal appearing in court were the same as court results. Whilst some offices commented on delays awaiting court validation, staff were nonetheless able to deal with urgent cases (custodies) straight away. In such offices other work (eg ordering full statements, citing witnesses, ordering productions, memos, requests for FSR, etc) was done once court validation was reconciled with minutes.

189. In the main administrative staff advised that they found Fiscal instructions understandable and legible but some indicated that sometimes writing could be difficult to read. In one office staff reported a complete absence of written minutes or lack of clarity requiring a referral back to a legal member of staff. In our case review we also noticed a couple of cases where no instructions were evident. In these instances it seemed that the administrative staff used their initiative to order full statements. Very occasionally we noted witness citations issued without a legal instruction obvious on the file but again these were rare exceptions.

190. We noted that one office operated with at least a three week delay in updating cases. This could have an impact on target achievement and churn especially when in this office there was a short time between pleading diet and trial diet and as a result less time to process work. Another operated with a 4/5 day delay.

191. We were concerned about the late administrative action in some cases. We were advised that in one office, where the problem seemed to be systemic, there were real concerns over staffing levels of support staff and these concerns were voiced to us during our inspection and were prominent in minutes of staff meetings throughout 2011. Indeed there appeared to be continuing problems with backlogs in the workload of support staff well into 2012 as we noted in our review of some 'live' cases.

192. Staff advised that they tend to only do work that has been instructed although on occasion some of the more experienced indicated that they might chase up legal staff for certain work to be instructed if it has been missed. This is very much dependent on the experience of staff.

193. Awaiting the return of court papers, searching for papers and asking for clarification of minutes/instructions impacted on the time taken to perform work and reportedly led to some delays in carrying out instructions.

Requesting and receiving full statements

194. There are certain targets/business rules that should be achieved in relation to requesting statements[19]. In custody cases staff should request statements for witnesses in the case immediately after court and for bail/'ordained to appear' cases request these within 3 working days. These targets are measured and monitored:

[19] COPFS Best Practice Guide for Summary Cases

Table 2

Target to Request Summary Statements YTD March 2012	
Aberdeen	98%
Alloa	97%
Ayr	91%
Edinburgh	79%
Glasgow	52%
Inverness	86%
Paisley	87%
Perth	99%

195. The above figures show that some offices managed to either meet or were near to meeting the target while others (in particular, Glasgow) struggled to meet the target. Our own case review results confirmed that with the exception of one office, full statements were, for the most part, being requested within the timescales envisaged. In the Glasgow office there did seem to be a high rate of failure to meet the target as indicated in the figures shown in Table 2 and worryingly the delays for requesting statements ranged from a day or so outwith target to several weeks in some cases.

196. Aside from the impact on target achievement, delays in requesting statements left less time for partner agencies to obtain, organise and supply the information.

197. The police should submit statements within 7 days in custody cases and 28 days for other cases[20]. Submission is by electronic means through the ISCJIS system.

198. The following table provides details of police achievement in submitting statements.

[20] Joint protocol between ACPOS and COPFS on Disclosure Practice and Policy

Table 3

Target to Receive Summary Statements YTD March 2012	
Aberdeen	86%
Alloa	87%
Ayr	92%
Edinburgh	90%
Glasgow	73%
Inverness	88%
Paisley	91%
Perth	92%

199. Performance is monitored and discussed at joint police/COPFS meetings and has improved over time.

200. Staff told us that there were occasions where they had to chase up the police for statements. It has to be noted that achievement is triggered **on receipt of the first statement only** and that it may be that subsequent statements are not submitted on target. However, this is not measured. The triggering of the target achievement by receipt of the first statement in the case can prove problematic for the Crown as there is no automatic reconciliation mechanism in the IT system to confirm that all the statements of the listed witnesses have been submitted.

201. In particular we found that different police forces across the country had different approaches to the submission of witness statements. For example in Glasgow we were told that statements for cases were submitted sporadically rather than in complete sets for the cases and this could impact on what could be disclosed to the defence and the timing of disclosure.

202. In other areas of the country such as in Alloa and in Perth the practice of Central Scotland and Tayside police forces practice was to collate in a batch for the case and then submit the statements. Because of the wait for all the statements to be compiled before submission we were told there were sometimes delays. These might be due to officers being on leave or simply having to be reminded. In Alloa we learned that the practice of the police was to send a memo advising of the problem so that the Fiscal could decide whether to wait for the complete set of statements or simply take what was ready and wait for the outstanding ones.

203. We heard also in yet another jurisdiction of problems encountered by the police in submitting the statements electronically. Spelling errors in names could mean that statements were 'rejected' by the COPFS computer system.

204. What was clear to us, however, was that the next stage in the administrative process, namely the disclosure of these statements to the defence, was wholly reliant on the timely submission of the statements by the police or other reporting agency. There could be problems on each side in the process of getting full statements to Fiscals on time.

Issuing citations to witnesses

205. Following the instructions provided by the Fiscal administrative staff should issue witness citations to advise witnesses when and where they should attend court to give evidence for the prosecution in the case.

206. For the most part citations are issued for postal service. Business rules for issuing citation of witnesses state that certain categories of witness, such as children, should always receive their citation by personal service. If there is less than 8 weeks until the trial the citation should always be issued for personal service. Where there are administrative delays leading to the issue of citations with less than 8 weeks to trial, in terms of business rules such citations should be issued for personal rather than postal service, with consequent public expense. Otherwise, the decision to issue a citation for personal service is a matter for legal discretion.

207. For obvious reasons, for custody trials where a very short timeframe is allowed, citations should be issued as soon as possible and these are always personal citations for civilian witnesses due to the timeframe. In the period April 2011 to March 2012 114,586 postal and 49,733 personal citations were issued. Of the postal citations issued 54,107 were returned as undelivered by the Royal Mail and re-issued as personal (almost 50%).

208. Witness citations for civilian witnesses are either sent for service by post or by personal service by a member of police staff (these were formerly served by police officers but current practice by police forces is that civilian legal document officers serve these citations). Police officers are cited for court by email.

209. We describe below the different practices involved in issuing citations to witnesses and the common problems we found in this aspect of the work.

210. We identified two issues relating to witness citation –

- Timing
- Proof of service information

Timing

211. According to the COPFS Case Processing Manual witness citations should be issued within 7 days of the pleading diet (or 'continued without plea' diet at which a not guilty plea was tendered).

212. During our review staff described varying practices for witness citations. Most of the staff we interviewed told us that they issued citations to witnesses straight away if they were in a position to do so. In some offices we heard of resource issues leading to backlogs of work which could contribute to delays in meeting the 7 day target. This was borne out by our case review findings.

213. Surprisingly, achievement of these targets is not measured by the Crown yet the failure to issue witness citations in time and failure by the police to serve citations timeously can have an impact on whether the citation process is successful. This in turn can impact on churn both at intermediate and trial diets.

214. In 5 offices witness citations were all issued within 7 days of pleading diet, thus meeting the target fully. In 2 offices where we were advised that there were issues with a shortage of administrative staff we found lower target achievement. This was especially so in one large office where almost half of the closed cases reviewed were outwith target for issuing witness citations.

215. Administrative delays were also noted in ongoing cases seen during our live case review indicating that the problems with backlogs were not short term blips but seemed to be a more persistent problem and of concern to the inspectors. We observed that in 5 cases we reviewed at 'live' intermediate diets there were delays of 4-8 weeks from pleading diet to citation of witnesses.

216. As we have previously explained the delay period between pleading diet and trial can vary enormously[21]. In one office, where a delay period for trial was over 20 weeks, it made no sense to issue citations to witnesses months in advance as experience showed that witnesses were more likely to forget about it. A deliberate decision was made to withhold issuing citations to witnesses until about 12 weeks before the trial so that citations would reach witnesses in good time for trial but not so early that they would forget all about it.

217. Given the fluctuations in the delays between pleading diets and trials (of which the Procurator Fiscal has no control) we wondered if, in fact, the appropriate 'target' for issuing citations to witnesses should be a period **before** the intermediate diet (say 8-10 weeks) rather than a period **post** the pleading diet.

RECOMMENDATION 9

We recommend COPFS measure target achievement in relation to witness citation.

[21] See Table 1

Proof of service information

218. For each witness selected, the ‘execution return date’ must be fixed by administrative staff. This is a target for the police to return an execution of service to the Fiscal. According to the guidance manual this should be fixed by staff as follows:

- 3 days before the intermediate diet (postal citations)
- 10 days before the intermediate diet (personal citations)

219. In practice we noted that there were marked variations between offices as to the date chosen for the ‘Execution Return Date’. This ranged from 7 days in one office to 3 weeks in another. We were advised that the execution return date was set for a 10 day period by default on the computer system (10 working days before intermediate diet) yet some staff told us that they extended the return dates to give themselves more time to get any follow up work done to trace missing witnesses or make further enquiries. No-one seemed to adhere to the ‘3 days’ rule for postal citations. As we go on to explain this can have unintended consequences for those citations needing personal service by police.

220. Although the administrative staff in each office set up the process for issuing witness citations, either by post or for personal service, the citations were actually printed by and issued by the discrete unit of COPFS called the ‘National Print Unit’ (NPU), based in Glasgow. Each day the NPU generates all the citations instructed by administrative staff in offices all around the country. The witness citation package includes a reply form that the witness must complete and return indicating that they either will or will not attend court on the specified day.

221. Reply forms should be returned to the NPU where they are scanned into the IT system. The scanning of replies triggers completion in the IT system of a ‘date record’ confirming the date of receipt of the reply form. The actual reply is scanned and saved into a separate database (called Power Retrieve) which can be accessed by administrative staff.

222. Where the witness signs and returns the reply form indicating that they will attend the reply form is scanned and saved. The reply does not go back to the office that issued the citation but the IT system is updated to reflect the position. If a reply is received at NPU indicating that the witness is unable to attend this is emailed to the office concerned. Administrative staff must check mailboxes daily for such replies so that they can be brought up for legal review.

223. Where there is no reply from postal service by the 18th day the IT system automatically issues a personal citation to the police to serve. This can occur when a witness receives the postal citation but fails to return the reply form, where the reply form is returned late or where the postal citation does not reach the intended recipient, for example, due to relocation. In any of these situations the citation is recorded on the IT system as ‘personal after failed postal’. However, the ‘execution return date’ fixed at the outset by the administrative staff remains the same. As we have said

administrative staff should have inserted a date 3 days before the intermediate diet but in practice much earlier dates were chosen.

224. We were advised that sometimes citations were issued to the police to serve when the target date for service had already expired leading to confusion especially when it was evident that the trial was still some weeks ahead.

225. We spoke to police forces about the issues facing them in trying to serve citations on witnesses within the 'execution return date'. It became clear that some police staff had some misunderstandings of what that date represented. Some police staff thought that the target was for service on the witness rather than the date for the execution to be returned to the NPU.

226. On the other hand Fiscal Office staff checking the outcome of service of such witness citations were often in the dark about whether the witness had been given their citation and urgently needed to update the papers about whether a witness was in fact cited to attend court to provide a clear picture for legal staff appearing at either an intermediate diet or trial diet.

'Witnesses cited for court' report

227. At any stage after witness citations are issued in a case it is possible for administrative staff to run off an IT generated printout showing the most up to date position regarding witness citation. During our inspection it became increasingly clear that there was a lack of clarity about the information provided in the IT generated 'witnesses cited for court' report. The printout was widely viewed as unfit for purpose and had to be supplemented by additional investigations by administrative staff to provide legal staff with a clear picture as to whether witnesses had received their citations. We heard complaints from sheriffs about the quality of information that Fiscals were able to provide in court about witness citation and these were directly related to the quality of the information provided by these reports.

228. We were pleased to note that an improved version of the report was introduced in April 2012 as we drafted our inspection report. We believe that the improvements made to this printout will go at least some way to provide a clearer picture of the status of citation of witnesses for cases being prepared for intermediate and trial diets. In particular, the improved style of report now contains information about -

- When the citation was issued;
- The type of service: postal, personal, failed after postal or police email;
- The date an execution, whether served or not, is received back from the police or from the witness by post; **and importantly**
- Service Outcome eg Witness Citation Executed; Witness Cited but Unavailable; Witness Citation Not Delivered; Witness Personal Cite Unserved; and Witness Cite Outcome Unclear.

229. In view of the fact that the NPU is the national conduit of all information to and from police forces about citation of witnesses there is sometimes a time lapse between the citation reaching the witness (or not) and the

information about the service (or lack of service) showing up on the IT system at the local office. In addition, where the citation is shown as 'not delivered' or 'unclear', the additional information provided by the police staff attempting to trace or serve the citation is crucial. In the latter situation the NPU must send to the Procurator Fiscal's office concerned a copy of the reply from the police. In addition any information about a change of address by police documents servers is communicated to COPFS via the NPU where staff scan the information into emails to relevant office email boxes. In order for this to be picked up the administrative staff need to check email mailboxes on a daily basis.

230. We heard of some varying practices around the country where Fiscal Office staff were provided with the very latest information about the attempts to trace and serve witnesses direct from the force. Police in Ayr provided information by giving Fiscal Office staff access to a constantly updated spreadsheet charting progress of witness citation attempts. In turn this information could be given to legal staff to enable them to make prompt decisions about the likely chances of securing attendance of important witnesses and whether the prosecution should continue or not, motions to adjourn sought or decisions to carry on without. This practice was not universal and depended on the good partnership relations forged locally. This good practice we commend.

231. We found that where there was some co-location of police within the Fiscal Offices then more day to day co-operation was evident on a number of topics including witness citation. Constant exchange of information between police and Fiscal's Offices about witness citation helped both sides. For example we learned that there was a practice in Central Scotland police forces for additional communication by email directly to the Fiscal's Office to provide the most up to date position about citing witnesses where the target date for return was imminent. In Edinburgh witness citation officers could contact the Procurator Fiscal's office direct and seek an extension to the target date for service if they thought there was a chance of tracing and serving the citation. This prevented a duplicate citation being issued by the NPU due to no reply.

232. Some forces also reported an issue with repeat citations being issued for personal service often to the same wrong address where information provided in a previously returned execution of service about a new address did not seem to have been updated by Fiscal Office staff. In another force there was email communication to the Procurator Fiscal's office about any new address information rather than simply relying on the NPU scan of the reply form to filter back to the Procurator Fiscal's office and this picked up and actioned. As a result of the information being transferred directly to the office we were advised by the police that the number of repeat citations issued for personal citation dropped significantly.

233. Another issue for police citation servers was that on receipt of the citation by hand many witnesses advised that they had received their citation by post. If they did not submit a reply or the reply was late then the personal citation was issued by default. This seemed to create unnecessary duplication of effort. One opinion offered to us was that the citation

package sent by post to witnesses contained a lot of information. The reply form was found at the back of the documentation and could easily be lost. This was confirmed by one Fiscal who told us that they regularly had witnesses turning up for court having received a postal citation, to which they had not replied and not having received their personal citation.

234. All of these issues and more were being examined in a multi-agency working group (under the auspices of Scottish Government's Making Justice Work programme) 'Getting People to Court', of which a sub group 'Getting Witnesses to Court' was particularly concerned. It seemed that better ways of communicating between Procurator Fiscal offices and those carrying out citation service was key to improvement.

235. Communication with the witnesses themselves was also a key factor and we noted with interest a pilot in Edinburgh to text witnesses who had been cited by post reminding them to attend court. The pilot commenced at the end of January 2012 and was to run for 4 months. It was being monitored but had yet to be evaluated at the time of our report.

Police witnesses

236. We have already mentioned the good practice of trying to take into account police availability when fixing dates for trials (although we think there is scope for this to be extended to civilian witnesses also). In a few forces we heard of plans to use an IT fix to ensure that trial scheduling took into account the availability of police witnesses involved in the case. This would have the effect of reducing churn by reducing the number of cases needing to be rescheduled due to their non-availability and also reduce the number of requests for excusal from attending court submitted to the Procurator Fiscal.

237. In more than one Procurator Fiscal's office we visited there was a co-located police officer who had responsibility for ensuring that any police witnesses who were no longer needed for court could be countermanded and rescheduled for other duties as early as possible. Such arrangements were of great benefit to the forces concerned as officers could be redeployed to other duties and created savings to the police budget.

Ordering productions

238. We have outlined in detail how we believe the way in which legal instructions are provided about productions could be improved by a more bespoke approach to each production involved in the case.

239. According to Best Practice Guidance productions for custody cases should be ordered immediately after court (or no later than the next day) and they should be submitted by the police within 7 days of that date. For all other cases productions should be requested within 3 days of a not guilty plea and submitted by the police within 14 days of that date (para 2.11). This is not measured.

240. When we looked at how administrative staff responded to Fiscal instructions to order productions we found that overall administrative staff

did what was asked of them. We observed occasional instances of administrative staff noticing that instructions were not always clear or complete and bringing this to the attention of legal staff or ordering productions on their own initiative. Much was down to the experience of administrative staff in the office.

241. In keeping with our findings about other administrative work we noted some delays in one office especially where there were 16 cases in which productions were ordered late 4 of which were only ordered days before the intermediate diet. Otherwise productions were ordered fairly promptly and most within the guideline period of 3 days after pleading diet.

242. Generally staff did not seem to differentiate between ordering productions to be lodged immediately and those instructed to be lodged at court.

CCTV

243. In more than one office we found that the ordering of CCTV footage was not as clear as it might be. For example in one case involving CCTV the first request to the police was for the CCTV footage to be formatted for playing in court and lodged with the Procurator Fiscal's office. We then noted a memo some weeks later requesting the relevant certificates confirming the provenance of the CCTV and certifying the reformatted disc as a true copy. Clearer instructions at the outset might have prevented the necessity for the second request. We observed that different styles of request letter were used around the country depending on the local police force practice about formatting and copying.

244. Police in one force told us that officers might well seize CCTV and lodge the disc without ever viewing it so may not be aware of the need for reformatting. In other forces there were moves towards providing clearer information in the SPR about the nature, quality and provenance of CCTV, allowing for an improved approach to the request for court use. In Edinburgh we noted a very much more detailed letter from the Fiscal requesting CCTV evidence with clear instructions about what certification was expected also.

245. Strathclyde police have a discrete unit for copying and reformatting all CCTV whether public or private space and undertake that on request from the Procurator Fiscal this will be ready within 14 days in summary cases (48 hours in custody cases). This relies on the reporting officer lodging the footage with the unit at the time of submitting the report, along with the appropriate certificate of provenance. This also depends on prompt instruction from the Procurator Fiscal and from our case review it seemed that there were some shortfalls on both sides.

246. We heard of a medium term plan to have CCTV footage captured, saved and copied to the Crown via the IT system, although this was thought to be for the future and perhaps considered in IT plans for a single police force in 2013. The COPFS have CCTV evidence as a component of their digital evidence strategy.

247. It was a common feature of intermediate diets that we observed that CCTV footage was inevitably late – in almost every court in the country. Any moves to improve the way CCTV is obtained by the police, submitted to the Procurator Fiscal and used in court is to be welcomed.

Forensic reports

248. As we have already described, in some offices, legal staff completed the full instruction for analysis at the marking stage or at least provided instructions elsewhere in the case preparation instruction to allow administrative staff to complete and submit the pro-forma request.

249. There is a protocol between COPFS, the Association of Chief Police Officers (ACPOS) and Scottish Police Services Authority (SPSA) containing detailed business rules about the way in which forensic analysis is instructed by the Crown and the timing of such requests. For summary cases where a scientific analysis is required to prove the case, whether involving drugs, DNA, or other, the protocol is clear that the instruction should be submitted on the day following a plea of not guilty at the pleading diet or continued without plea diet. The SPSA in turn should submit the forensic report 10 days before the intermediate diet.

250. This depends on a timely instruction by Fiscal Office staff and we have already outlined the issues in some offices in achieving timely case preparation work. In addition the laboratories also rely on the police lodging the productions with them to be examined. Liaison is between the laboratory and the force concerned on receipt of the request to analyse.

251. We were unable to determine with any degree of certainty when administrative staff submitted the requests for forensic analysis. In our closed case review we noted only one or two cases where late receipt of forensic reports were noted. In one case it seemed that, in error, the wrong date for expected receipt was put on the request. In another, it seemed that the delay was down to the police not lodging the productions at the laboratory in good time.

252. During our fieldwork around the country, observing 'live' intermediate diets and speaking to legal staff and sheriffs, there were few issues with the Crown's timely receipt of forensic reports but cases sometimes had to be continued for further steps such as instruction of an expert witness for the Crown and/or the defence. In Glasgow however one sheriff told us that there were significant delays in the Crown obtaining forensic reports which had led to churn of cases in the system.

253. At the present time there are 8 police 'gateways' for forensic analysis requests but in planning for a single police force next year we understand that matters are still under consideration for a single police gateway to forensic services. It is anticipated that this will bring greater consistency in police practice.

254. We were advised of a COPFS monitoring exercise, first introduced in Glasgow but now rolled out nationally, designed to improve the quality and timeliness of requests for scientific analysis. This exercise took the form of

an electronic gateway via Fiscal Office staff based in Glasgow to the SPSA. Initial results from the exercise suggested that there was room for improvement in both the timing of the requests and quality of the information provided to SPSA by Fiscals instructing the analysis. Training issues were being identified when we visited the gateway unit in Glasgow in October 2011 although we have seen no new guidance or refresher operational reminders about this aspect of case preparation.

255. We consulted with the Forensic Services Director of SPSA and the Deputy Director of Serious Casework in COPFS. Both were agreed that there were difficulties meeting the timeframes in the protocol for each organisation and this was borne out by internal monitoring figures we were shown. Staffing seemed to be an issue on both sides and backlogs meant that sometimes forensic evidence was not available on time.

256. For the Crown there needs to be an improvement in the accuracy and timeliness of instruction. We were told of planned improvements in monitoring of cases by SPSA and hoped for improvements to achievement of targets by summer 2012. We were encouraged by the assurances of both COPFS and SPSA that they were working together to resolve the acknowledged shortcomings on both sides. A single co-located gateway for COPFS and SPSA was under active consideration.

257. In respect of CCTV evidence and forensic reports (highlighted earlier) there is a need for an effective follow up procedure to ensure receipt and service of the necessary documentation. A diary ‘bring up’ system is essential as previously recommended.

258. We note the ongoing work among criminal justice partners to address both CCTV and forensic evidence and, therefore, make no recommendations.

Disclosure

259. COPFS is obliged to disclose to the defence all material information for or against the accused (subject to any public interest considerations). This relates to statements but it also relates to all information of which the Crown is aware[22].

260. During our inspection we learned that disclosure by way of ‘pen drive’ was being phased out as many more agents signed up for ‘secure web’ disclosure. By May 2012 all defence agents practising criminal law in Scotland had registered to participate in the Secure Disclosure Website (SDW) and were either fully operational and receiving all disclosure material on-line or were in the process of installation. By the end of June 2012 COPFS expected that all agents would be fully operational and that pen drive disclosure would be by exception only, eg in large or complex cases. By May 2012 we understand that approximately 118,000 disclosure ‘binders’ had been published and downloaded.

[22] Core Principles of Disclosure, COPFS Disclosure Manual

261. SDW reports are printed for each case and these clearly identify when documents have been downloaded to the secure website, when the email was sent to the agent advising of this, when uploaded/opened and if the download was successful.

262. There was almost universal approval for the secure website process from all parties with whom we consulted during the inspection process. Administrative staff found it much quicker and legal staff told us they were much clearer about what had been disclosed and when, since the printout from the website confirmed the time (to the second) and date of download of the material. Some administrative staff reported some instances of being asked to repeat the process for agents who had missed the timeframe for upload. Hopefully teething problems such as these will be ironed out in time as the process beds in.

263. The guidance to staff about all aspects of disclosure is found in the current COPFS Disclosure Manual. This is updated regularly and is supplemented by circulars as reminders to all staff. An overview of the process and timelines of disclosure of statements and PCOCs (Previous Convictions and Outstanding Charges) is shown in Annex **I.** For administrative staff there is also a guide on the IT process relating to the secure disclosure website.

264. We looked at the achievement of full disclosure against the timelines in every case we reviewed, in terms of statements, PCOCs and productions (where relevant and applicable).

265. Staff in some offices told us that they had difficulty in achieving disclosure in the timeframes given. The main reason cited for this was lack of resources. Other reasons included late receipt of letter of engagement from the defence agent, time involved in scanning documents, late receipt from the police, CCTV not playing, etc. During our fieldwork we noted in one office that staff preparing the following week's intermediate diet court had to redirect 16 files back to the disclosure desk as it had not yet been done. Staff in another office advised that this was often the case.

- Statements

266. We found a variety of different approaches to disclosure in the offices we visited. Statements tended to be disclosed either at certain stages in the process or as and when they came in. There does not appear to be a consistent approach. COPFS policy is that material should be disclosed on receipt.

267. There were occasions where some offices had to chase police for statements. However, we were advised that this had improved (see table of target achievement re receipt of statements from police).

268. In our case review we looked at whether all the statements in the case had been disclosed and then checked if they had been disclosed within the timeframes. For the most part we found that there was full disclosure of all the statements in the case. We did, however, find the odd case where one

or two statements had been missed because they arrived after the bulk of the statements had been submitted and disclosed.

269. **Timing** of disclosure was more of an issue in most of the offices we visited. In one office disclosure was made within the target timeframes in all but one (custody) case.

270. In another 4 offices success in achieving target was less impressive.

271. In 3 offices we noted poor performance for timeliness of disclosure.

272. Poorest performance was in one large office where, of the 41 cases reviewed, only 3 had full disclosure within target. In 11 of those cases we found that not all of the statements had been submitted by the police in time. Police practice in that area is for each police officer to submit his own statement. This seemed to result in statements arriving sporadically within the case folders on the IT system. We have already highlighted the problem that receipt of the first statement in a case triggers police target achievement.

273. In another office with poor results for timing of disclosure we heard from the office staff and confirmed by the police that delivery of full statements within timeframes was not routinely achieved.

274. In some cases, even where all statements had arrived from the police, lack of a 'letter of engagement' from the defence held up the process and the Crown had no control over this. However in some cases there was no obvious reason why there was not full disclosure on time other than perhaps staff resource issues.

275. We took an overall look at churn and the reasons for churn in all of the cases reviewed. It was not always possible to link late disclosure to churn given that there were many and varied reasons for churn, some of which were outwith the control of the Crown such as failure to appear by the accused.

- PCOCS (Previous Convictions and Outstanding Charges)

276. Some witnesses have criminal records and if those convictions or outstanding criminal charges are relevant and material they should be disclosed along with the statement of the witness concerned. PCOCs are redacted to remove any irrelevant material. Clearly timing issues were the same as for statements.

277. The process of obtaining the criminal record is that the request should be made by a member of administrative staff directly to Scottish Criminal Records Office (SCRO), if the witness details show a criminal record office reference number. A reply is received instantly and the record is then redacted by either legal staff or trained administrative staff.

278. In some offices it is legal staff who have responsibility to redact statements and PCOCs whereas in others it is administrative staff. Most administrative staff are happy to perform this function and if unsure they will ask a legal member of staff for advice, however, some feel that training should be given for redaction of PCOCs. In one office where it is legal staffs'

responsibility to redact we were advised that there was a backlog as there was no legal staff available to perform this duty due to other work commitments.

279. We found that the process we have described was followed and in most cases we could see evidence of disclosure of criminal history information. In some cases the letters to defence agents did not make it clear whether criminal history information was included, although the request to obtain the information was made to SCRO. This may be because the SCRO record disclosed nothing of any relevance or it may be down to administrative staff failing to make the letter to the defence clear about criminal history information.

280. However in one office (Glasgow) we found that in just under a quarter of the cases we reviewed (8 out of 41) a request for SCRO record for witnesses should have been made and was not. This is a matter of some concern as it demonstrates a clear breach of disclosure practice.

281. In addition, in one case in the same office, worryingly it appeared to us that the criminal history of a person not connected with the case was obtained and disclosed to the defence. Here, the police provided a SCRO number but on obtaining the record it seemed to relate to a different name and date of birth. The day and month of birth were the same but the year of birth was different and since the offending seemed to have taken place in a different jurisdiction we thought that it was highly unlikely that it related to the witness concerned. Obviously this was an error emanating from the police information but this should have been picked up and queried on receipt by Fiscal Office staff before disclosure to the defence.

RECOMMENDATION 10

Given its potential importance we recommend closer attention is paid to obtaining and disclosing previous criminal history records of witnesses.

- Disclosure of productions

282. As we have already outlined there are issues about precision and clarity of legal instructions in the ordering of all productions. For documentary productions our expectation was that we would see the productions recorded on the IT system as received at the Procurator Fiscal's office and clear reference to the productions in the disclosure letter to the defence.

283. We were told that timing of disclosing documentary productions varied from office to office eg as and when the documents are received or by running filters in date order.

284. In our case review we noted that where there were a number of documentary productions it would be important to list these in a clear way so as to identify them individually for proper record keeping purposes. Some were being disclosed by way of pen drive at that time and we did find pockets of good practice where it was clear from the letter to the defence exactly what was being disclosed. However we were disappointed

in the level of record keeping both in respect of what was lodged at the Procurator Fiscal offices and what was disclosed.

285. With secure web disclosure, where productions are received hard copy they must be scanned into the IT case file and individually named before being downloaded onto the secure website. Although administrative staff told us that they understood the benefits of this in terms of accurate recording they also told us it was very time consuming especially for cases with numerous documentary productions, such as benefit frauds, and that this has an impact on other work they have to do. There would be great benefits in receiving documents by electronic means to avoid this time consuming process.

286. It seemed that in a number of cases we reviewed there was partial disclosure of productions which made no sense. For example, in one case relating to drug charges the letter to the defence referred to the search warrant only and not to the equally relevant and material document – the production schedule completed by police officers conducting their search. Both documents had been lodged at the Procurator Fiscal's office.

287. In another case charges under the Animal Health and Welfare Act were libelled and the report from the Scottish Society for the Prevention of Cruelty to Animals (SSPCA) referred to an expert report by a veterinary witness. There was no record of such a document being lodged or disclosed to the defence on the IT system yet it would have formed a critical part of the Crown case. There was a handwritten note on the court minutes that 'copy productions' were on file and ready to be disclosed at the intermediate diet but no record of what those productions actually were. Such an approach was not uncommon in our inspection.

288. Moreover, even where there was a clear record of disclosure of documentary productions this was often close to the intermediate diet, at the intermediate diet itself or after the intermediate diet. This was sometimes but not always because of late receipt from the police. In one case documentary productions relating to uttering forged cheques were not even requested from the police until after the first trial had been adjourned (the accused failed to turn up for the first trial so the Crown's failure to prepare was masked). We also found one or two cases where drink driving charge forms (Form 4:8:1) which had been lodged with the Procurator Fiscal for some time were disclosed late or not at all. Early disclosure is recommended for such formal documentation.

289. The new provisions relating to solicitor access to suspects being interviewed by the police has already been mentioned. We found that SARF forms were commonly not ordered at the outset and had to be requested and disclosed late in the process.

- Disclosure of labels

290. For those productions that we have already described in our report as 'labels' – such as weapons, clothing and other non-documentary items, the existence of these items will generally be disclosed to the defence in the summary of the evidence provided at the outset. The Crown disclosure

manual provides that the defence should also be told of their whereabouts and given a named point of contact for viewing of the same. We could find no evidence in any of our case reviews to show that this was being done proactively. Occasionally we noted defence requests to view items. This did not seem to cause problems in the smooth progress of a case, provided the Procurator Fiscal replied to the defence request on time.

- Disclosure of CCTV

291. We looked at disclosure of CCTV as a separate issue since we were aware of the widespread problems reported about obtaining CCTV evidence, having it copied and then disclosed on time.

292. We have already outlined the difficulties in obtaining CCTV on time. If properly requested in the first place CCTV should be formatted and submitted by the police in time for disclosure before the intermediate diet. It would be of benefit to all concerned if CCTV were to be submitted and disclosed electronically but the technology to allow this to happen has not yet been developed for the criminal justice system.

293. Administrative staff told us that they checked that it would play and that it was compatible with equipment used in court. It was then copied for disclosure purposes and defence agents were advised that it could be picked up. Receipts were filed with case papers. In more than one office the police supplied the defence with copies of CCTV (if the Procurator Fiscal advised on the request the number of accused) and therefore there is no need to copy it inhouse.

294. We were advised that sometimes CCTV could not be viewed so arrangements were made to address this (eg the defence agent advised that it could be viewed at council offices or it was sent back to the police to reformat.

295. According to the Disclosure Manual disclosure of CCTV should never be disclosed automatically without being first considered by a member of legal staff (or precognition staff in solemn cases) to ensure it conforms to tests of relevancy and materiality. We were not aware of any procedures in place in any of the offices concerned where this happened as a matter of routine. We noted that Fiscals rarely had time to view CTTV footage during their preparation of the intermediate diet courts and we heard that only rarely was CCTV footage viewed at earlier stages of the case. There was no obvious legal input into the processes for disclosing CCTV to the defence. If our recommendation about full case review is followed (see Recommendation 14) this could be achieved.

- Disclosure of forensic reports

296. Provided that forensic reports are served on the accused then disclosure of this material has been achieved. We found that it seemed to be fairly common for forensic reports, if available, to be prepared for service on the accused at the intermediate diet. In Chapter 3 we outlined how the case marking instructions should include proper instruction about follow up on receipt of the forensic evidence so that the report would be served on the

accused and negate the need for scientists to give evidence. It seemed that, in practice, this was picked up during preparation for the intermediate diet so that personal service could be effected in court.

- Other disclosure issues

297. These findings were from the closed cases we reviewed and related to timing of disclosure between the pleading diet or first calling of the case to the intermediate diet. As indicated we carried out some 'real time' review of cases by looking at a sample of cases at live Intermediate diet courts where we observed the preparation by the Fiscal and then sat in to observe the court proceedings. We heard of some continuing problems for the Crown in achieving disclosure in good time before the intermediate diet and considered the extent to which disclosure or lack of or incomplete disclosure caused cases to 'churn' in the courts.

Disclosure in live case review

298. Our inspection included visits to observe the preparation of and conduct of intermediate diet courts in each of the offices we were inspecting. In two offices problems with disclosure persisted.

299. In the first office in 20 cases (a third of the cases calling in the intermediate diet court) we observed issues about lack of full disclosure. It seemed that statements had not been received in a number of cases hence the delay in disclosure but the court did not probe the reason for the late receipt of statements and the date of request. The Fiscal in court may not have had the information easily to hand in the paper file. Our own review of the state of preparation of the Crown for this intermediate diet showed that late action by administrative staff may have contributed to the late receipt of police statements in some of the cases calling. Disclosure of CCTV was still awaited in a couple of cases.

300. In one case in which defence agents had sought copy productions the Crown still had not complied with their obligations 2 months later. We noted that this case had been reduced from solemn proceedings and should have had advance preparation work carried out. Had this been done the missing productions ought to have been identified and requested. The case was continued for a further intermediate diet to resolve this matter with the sheriff expressing concern about the progress of the case given that it was set down for a 3-day trial.

301. In the second office, of 62 cases calling, some 20 cases had disclosure issues. It was clear from speaking to both administrative and legal staff preparing for the court that disclosure was being done very last minute, either the day before the intermediate diet or on the day of the court itself. In 4 cases disclosure had not been done at all and was to be followed up after the intermediate diet court. Where there had been partial disclosure, outstanding matters were commonly CCTV, forensic reports, police interview tapes and photographs. This finding ties in with our earlier comments about the need for focused, clear and full instruction for all productions at the case marking stage, bearing in mind what the defence will want disclosed to them in the event of a plea of not guilty.

302. We noted that in one or two cases the defence were attempting to place a higher burden of disclosure than the statutory duty encompassed. In another case the defence wanted the Crown to make enquiries about whether there was CCTV footage available for an incident that occurred in a busy city centre street that was well known to have CCTV cameras in situ. There was no mention in the SPR of any footage being viewed by police officers and it was down to the defence to investigate this with the police, although the Fiscal was asked by the court to assist the defence in their enquiries.

303. In two other offices we found that generally disclosure had been carried out ahead of the intermediate diet court with occasional further continuations for CCTV evidence that was still outstanding. In yet another office disclosure was not an issue save for one case where there had been a change of agency and the new solicitors instructed were awaiting the disclosure file from the previous agents. Indeed change of agency delays cropped up in more than one court. The Crown fulfils its obligation to disclose on the first occasion and on a transfer of legal aid the file should be transferred by the original agent.

304. In all the courts we observed we noticed that a small percentage of cases where disclosure had taken place were continued to a later intermediate diet because of 'possible resolution'. We heard of 'Sheriff shopping' or 'Fiscal shopping' where the defence simply wanted to put the case off to a later date in the hope of negotiating a 'softer' plea or having a more lenient sheriff sentencing their client on a plea or partial plea of guilt.

305. Although there was poor performance in relation to disclosure in our closed case review of one office this did not seem to be a problem at the time of our visit in October last year. This was confirmed to us during meetings with the Sheriff, COPFS staff and the local criminal justice co-ordinator. We were told of a monitoring exercise carried out by managers in COPFS to try to establish the extent of the problem and in many cases where lack of disclosure was cited in court it transpired that disclosure had been carried out. This highlighted the need for full information to hand for Fiscals in court. Everyone with whom we consulted agreed that the secure web disclosure system had improved the provision of information about disclosure and enabled Fiscals to robustly counter any misleading statements to the court in this regard.

Management information about disclosure

306. The guidelines for timeframes for disclosure are shown in Annex I but there is no mechanism in place to measure achievement of timely disclosure. In one office we were advised that disclosure was monitored by the legal manager. This was achieved by administrative staff creating a spreadsheet by taking information from 4 screens.

307. There is no easy way of identifying which cases have been disclosed as there is currently no exception reporting relating to this. It requires staff running a report for the intermediate diet date and looking through each case, which is time consuming.

308. COPFS should look into identifying whether this can be done with a view to introducing it to allow staff to deal with only cases that still require to be disclosed and to allow management to measure whether targets are being met while also identifying specific issues where disclosure has been delayed.

RECOMMENDATION 11

We recommend the creation of a system to monitor performance on disclosure.

New incoming mail

309. Correspondence connected to summary cases arrives in a number of different formats. Reporting agencies with further information about the case submit ‘subject sheets’ via the electronic system, FOS. Administrative staff have a responsibility to check the electronic system for new information. We found occasional cases where it appeared that such information had not been printed and brought to the attention of legal staff.

310. Police officers seeking excusal from giving evidence in court also submit their requests by electronic means. In two offices we learned of staffing backlogs, both administrative and legal, leading to delays in dealing with such requests. In those offices where dates of trial were fixed with police availability in mind there were fewer excusals to be dealt with. One area had centralised their police excusals and this led to increased efficiency which was welcomed by the police locally.

311. In one office administrative staff (with special training on factors such as admissibility and sufficiency) either approve or reject police excusals however we were of the view this type of work should not be carried out by administrative staff.

312. Hard copy mail from defence agents, witnesses and others is processed by administrative staff before being forwarded to legal staff to deal with. This is also managed on a daily basis, although in one large office due to resource issues there were delays in matching mail to cases. We heard complaints from a number of defence agents that mail routinely went unanswered at that office and this was something we experienced first hand.

313. We learned that defence solicitors were being offered the chance to sign up to a secure email facility accredited by the Government Secure Community. This is still at a fairly early stage with no current information available to us as to how many agents had opted for this. It is hoped that this system will help to alleviate some of the mail processing delays involved in matching letters to paper files.

314. Whatever the method for dealing with mail, there is a need for well managed systems for checking mailboxes and sufficient staff to deal with these matters.

Staffing

315. Administrative managers indicated that workload was testing, resilience was poor and it was hard to keep momentum. Phrases such as “keeping head above water”, juggling work and shuffling responsibilities were common in our visits. Loss of staff had an impact.

316. Staff themselves said they felt the pressure and preparation of cases was suffering.

CHAPTER 6 – INTERMEDIATE DIETS

317. The first provision for a court hearing between pleading diets and trial diets was made by the 1980 Criminal Justice (Scotland) Act. This Act created 'intermediate diets' and gave the court power to fix such a diet for the purpose of ascertaining –

(a) the state of preparation of the prosecution and of the accused and
(b) whether the accused intended to adhere to the plea of not guilty

318. This was entirely a discretionary power but growing concerns over late pleas of guilty and waste of court and witnesses time resulted in these becoming mandatory (in nearly all situations) in 1995 with the passing of the Criminal Procedure (Scotland) Act 1995. Section 148 of that Act which, subject to later amendment, still stands as the relevant statutory provision in force today.

319. The 1995 Act and later amendments now provide that the court must fix an intermediate diet:

"For the purpose of ascertaining so far as is reasonably practicable, whether the case is likely to proceed to trial…and

(a) the state of preparation of the prosecution and of the accused
(b) whether the accused intends to adhere to the plea of not guilty and
(ba) how many witnesses are required by –
  (i) the prosecution
  (ii) the accused
  and
(c) the extent to which the prosecutor and the accused have complied with the duty under section 257(1) of the Act."

320. In terms of the evolution of intermediate diets, various amendments have made more prescriptive the nature of the courts enquiry while ensuring that new legislation (Sexual Offences/Vulnerable Witnesses/Witness Anonymity) is reflected therein.

321. The preparation for intermediate diet is the first occasion for a full legal review of the case since 'front loading'.

Timescales

322. In terms of the preparatory work which needs to be completed in advance of the intermediate diet, and the duty on the Crown to disclose, it becomes important to consider the time gap between the first calling of the case and the intermediate diet.

323. In the course of our fieldwork the shortest time between first (or continued) calling and intermediate diet we found was one week, and the longest was 31 weeks, with the overall average between the 8 courts for all diets being 10+ weeks.

324. For custody cases it is assumed (for disclosure purposes) that the time between pleading diet (first calling) and intermediate diet is normally 2-3 weeks.

325. These timescales are challenging. However, clearly a gap of only one week between first calling and intermediate diet is insufficient time to allow for disclosure to be effected. This is significant in relation to the conduct of intermediate diet courts.

326. For cases where the accused is admitted to bail or ordained to appear at the intermediate and trial diet the target dates are understandably more generous. This assumption fits with our findings in relation to the timescales for the average gap between pleading diet and intermediate diet. If the timescales **were kept** there is a (desirable) minimum 8 week gap between the 2 diets to allow disclosure to be effected. In fact wide variations were seen in fieldwork as described above and as shown in Table 1.

Court loadings

327. Intermediate diet courts can vary widely in size, depending on the jurisdiction and of course the business in any particular court. Of the courts we visited the smallest intermediate diet court had some 35-40 cases calling regularly and the largest had at times 80+.

328. When summary justice reform was introduced it was recommended (by the McInnes Committee) that the maximum number of intermediate diets in one court would be about 30. We found intermediate diets with beyond double this number. The time allocated for a Fiscal to carry out their preparatory work is critical and of course should take account of the court loading with which they are working.

RECOMMENDATION 12

We recommend that efforts are made in liaison with Scottish Court Service to limit the number of intermediate diets to the recommended maximum of about 30.

Administrative preparation

329. Administrative staff play a crucial role in the preparation of summary cases. Instructions by Fiscals to carry out certain procedures and processes (such as ordering productions, citing witnesses etc) are meaningless unless the necessary follow up action is taken.

330. Best Practice Guidance states that the ‘suggested optimum time for intermediate diet preparation is two weeks prior to the intermediate diet’. It is considered that there was not much to be gained in preparing cases too far in advance since documents requested may not have been received or witnesses cited etc. However, leaving administrative preparation to less than a week before leaves little time to resolve issues, chase up outstanding matters and will inevitably impact on legal preparation and on churn. We found the timing of intermediate diet preparation varied from office to office. In some offices administrative staff started to prepare cases well in advance of this while others only managed one week or less.

331. When checking whether witnesses have been cited all offices made use of the ‘Witnesses Cited for Court Report’ as referred to above. Some offices also printed executions for all civilian witnesses for the intermediate diet.

332. All offices use the ‘Secure Disclosure Website Print’ to identify what disclosure has been done for each case. The print provides very good information and allow Fiscals in court to identify what has been disclosed, when, to whom and whether it had been downloaded by the defence.

333. Administrative staff should prepare cases in advance of the intermediate diet to ensure that all instructions have been followed eg documents have been requested/received/served, witnesses have been cited, disclosure has been done, etc and to check on the current position of any outstanding matters all in preparation for the trial. Their preparation needs to be done before legal preparation in order to provide the Fiscal with an up to date position on the citation of witnesses, disclosure of evidence and any other bespoke instructions.

334. We found administrative actions recorded in a number of ways –

- Noted on the hard copy case instruction sheet
- Updated FOS instruction sheets
- Use of an intermediate diet checklist
- Post-it notes

335. Intermediate diet ‘checklists’ are used in all offices but the format differed from office to office. In 2 of the offices only legal staff use a checklist and in one office the FOS Instruction Sheet, originally completed with legal instructions, was updated by administrative staff as they carried out these instructions. Post-it notes can become detached from papers and should not be used.

336. It is envisaged that all offices will become paperless and therefore all actions taken will be recorded on the FOS instruction sheet but since only one office was using this system during our inspection this is still some way off indeed. Where used it was supplemented by a checklist of sorts. We consider that the intermediate diet checklist should be standardised and used throughout for consistency.

337. We thought it was desirable for administrative staff to have a standardised checklist (at least within Federation) until the full availability of the electronic case record on FOS.

RECOMMENDATION 13

We recommend the use of one standard method of recording administrative action for preparation of intermediate diets.

Legal preparation

338. Best Practice guidance stipulates that it is essential that Procurators Fiscal undertake thorough case preparation sufficiently in advance of the intermediate diet to ensure that the Crown fulfils its obligations (particularly in respect of disclosure, and sections 257 and 258 of the Criminal Procedure (Scotland) Act 1995) and, as far as possible, is fully prepared for trial.

339. Time was an issue in every office for Fiscals in relation to preparation of intermediate diets. It was apparent from observations and discussions with staff that their focus was on preparing for the intermediate diet court as opposed to preparing the cases for trial.

340. In various offices we were advised by Fiscals that they 'tailored' their preparation of the intermediate diet court to the sheriff who would be presiding over same. For instance, if they knew that a particular sheriff would want particular information or be particularly proactive, their preparation would accommodate this and be more comprehensive. If they knew that a sheriff would be particularly passive and non-proactive their preparation would be more sparing. While this approach is not commendable it is understandable, particularly when court loadings are taken account of.

341. There were both similarities and variations in how Fiscals prepared their courts. A Fiscal preparing an intermediate diet court has many resources at their disposal which can at times create difficulty in drawing them all to use.

342. Generally Fiscals began with the 'hard copy' file before them. This should contain all up to date information on disclosure, citation of witnesses and minutes from those dealing with the case previously. Most Fiscals also had a computer in front of them with screens open in two IT systems. This in itself is an indication of how cumbersome intermediate diet preparation can be and given the number of cases which Fiscals are dealing with regularly, this is particularly so. Additionally in the course of their preparation Fiscals regularly needed to liaise with members of administrative staff in relation to disclosure, productions etc which adds additional potentially time consuming steps.

343. We referred above to the intermediate diet checklist. For legal staff the completion of a checklist can provide a useful aide memoire in relation to their preparation for court. The potential, however, is that the focus shifts from the preparation of the case to the completion of the checklist, particularly where time is short. Care needs to be taken to ensure that any checklist adds value to the case preparation and is completed in a meaningful way by staff.

344. In the office where the FOS Court Instruction Sheet was used as a checklist, this was found by the dedicated intermediate diet Fiscal not to offer the best format for quick referral in court and for that reason he used his own handwritten notes on the file Minute Sheet for this purpose. Additionally the Fiscal found the process of adding a Fiscal instruction, saving and printing the sheet, time consuming.

345. This example highlights some of the difficulties and needs of Fiscals preparing for intermediate diet courts. The difficulties relate to capturing information from a variety of portals and individuals and securing them in one place. The needs relate to ensuring that the information is accessible quickly and cohesively for use in a busy court.

346. We saw other examples of Fiscals completing checklists and supplementing these with their own individual notes. While Fiscals will have their own individual ways of working this is perhaps indicative that the present formulae for intermediate diet checklists is not yet fit for purpose.

347. One Fiscal commented that there would be a benefit in incorporating all information in one place. IT fixes may assist either along with or as an alternative to an extension of administrative preparation to ensure that all information required by the Fiscal is available to them in one place, and in a format that they are able to extend, adapt or use as an aid in the conduct of the court. We thought that what was needed here was a formal record capturing the legal evaluation of the case being quite separate from the process information already provided in the administrative checklist. This should be part of the case file on both the paper file and IT system for future reference.

348. In every office we visited it was apparent that Fiscals were preparing their intermediate diet courts subject to time constraints in view of the number of cases they had. The SPR appeared to be the main focus in relation to considering the case, as of course it would have been for the marking Fiscal. In most offices the SPR was read or at least the analysis of evidence therein at this stage. However, importantly the full statements should be available to the intermediate diet preparation Fiscal.

349. With very few exceptions we were consistently told by Fiscals that full statements were not always read as they did not have the time. They effectively cherry picked the cases in which they would read the full statements. There were particular time constraints where despite the intermediate diet Fiscal being considered “ring fenced” they in fact had to deal with a variety of other matters during their preparation time such as warrant applications, proceeds of crime applications, deaths enquiries.

350. The cases where full statements were read tended to be cases which were not straightforward or where the Fiscal had highlighted issues from the SPR. In terms of adding value to the case and in terms of legal analysis a reading of the full statements is essential. The SPR is the version of events filtered through the mind of the reporting officer. The full statements are the version of events in the words of the witness themselves. There is no substitute for reading these in preparing a case

for trial. The reporting officer in summarising the evidence may have glossed over or omitted facts as spoken to by the witness which could be pivotal to the conduct of the trial or important in the context of agreement of evidence which will be missed if the full statements are not read. This is as likely in a simple case as it is in a complex case. Additional witnesses may need to be cited and others countermanded.

351. In our review of closed and live cases we saw examples of cases being discontinued after the intermediate diet on full statements having been read. In other cases statements did not contain the evidence as anticipated and a plea was agreed.

352. In one office, in one of the live cases we reviewed we saw that a holistic review of evidence made a real difference to the legal preparation of a case. The Fiscal identified that a former co-accused would be required as a witness in order to prove the case and an instruction was issued to that effect. Had the case not been prepared to this extent this may have been missed.

353. Considering the evidence in a case does not only mean considering the written statements and documents. It also means viewing the CCTV evidence, looking at documentation and perhaps 'labels'. Once again consideration of this evidence suffered due to the lack of time on the part of the intermediate diet Fiscal. Increasingly cases are reliant on CCTV evidence and it is crucial that this is viewed as part of legal preparatory work. We now see situations with disclosure where CCTV evidence will have been disclosed and viewed by the defence agent in advance of the intermediate diet but the Fiscal in court will be unsighted in relation to same, putting them at a clear disadvantage. They will not have seen their own evidence whereas the defence agent may have done. This is clearly unacceptable.

354. In one office we saw clear evidence of a more holistic approach to the legal preparation of cases driven by leadership. Court loadings were considered and managed to a maximum of 50 new intermediate diets in each court, providing clear parameters for court staff, albeit well beyond the numbers envisaged by summary justice reform. A rota structure was put in place to support legal staff in focusing on case preparation. Administrative and legal functions were clearly separated and defined and staff urged to concentrate on their particular functions. This empowered staff to fulfil the responsibilities assigned to their role and take real pride and ownership in their work. Members of the team had real confidence in each other and their work. This led to a cohesive, genuine team approach which was apparent through interviews with team members at all levels.

355. Legal consideration of cases was positively encouraged, which is to be commended. Cases should not simply be processed through a series of events. They should be considered, analysed, decisions made and progressed accordingly. Legal staff are pleaders, not processors.

Evidence capable of agreement

356. As referred to at the outset of this chapter agreement of evidence is an important aspect of summary justice reform. In preparing intermediate diets Fiscals appeared alive to this as a matter for consideration and several advised that they would contact agents proactively in this regard.

357. In our closed case review we found that evidence capable of agreement was not always identified by Fiscals. This is significant in the context of minimising inconvenience to victims and witnesses and saving resources, both financial and in terms of court time, not to mention in terms of the Crown's statutory obligations.

358. We found almost no evidence of engagement with the defence in relation to resolution of cases, discussion of evidential issues or seeking to agree evidence in our review of the closed paper files. In fact in one case we found correspondence from an agent in relation to resolution of the case unacknowledged. This is not to say that there was no engagement, simply no evidence of same. That having been said, it is essential that those dealing with cases have all information available to them. If there has been engagement with the defence in relation to any of these matters, it is crucial that this is accurately recorded and dated for anyone dealing with the case thereafter. This avoids double handling of issues and allows staff to make informed decisions.

359. The situation as detailed above is clearly not in the spirit of summary justice reform where a much more proactive approach was envisaged. We did see some evidence of proactive approaches by Fiscals during our office and court visits, however, these tended to be done on an ad hoc basis by phone fairly close in time to the date of the intermediate diet and so outcomes were mixed.

360. Our legal system is adversarial (the burden of proof rests with the Crown) and those conducting their business in our courts have their own opposing agendas. The Crown cannot make the defence engage, they are adversaries and indeed the Bench has no sanction to impose on parties should they fail to engage with each other.

361. That being said, there are clear gains to be made by the Crown in adopting a proactive approach. Firstly, they would be complying with the legislation and their internal guidance. Secondly, being prepared and having been proactive in contacting the defence, even fruitlessly, the Crown would be in a much stronger position at the intermediate diet. The Crown should aspire to the position where they are prepared and confident in advance of the intermediate diet, having fulfilled all of their duties and obligations. The sheriff making enquiry as, he should, in compliance with the legislation, as to the state of preparation of the case would know the Crown had played its part and it would fall to the defence to explain their position and if necessary their lack of engagement. Defence agents themselves advised that the more prepared the Crown were at intermediate diet the more likely it was that the spotlight would then shine on them.

362. During our live case review in attendance at intermediate diet courts we routinely heard the Fiscal asking the defence if evidence could be agreed. In accordance with the legislation and guidance this should have been considered and secured in advance of the case calling in court.

363. This tied in with our findings from our closed case review where we found a lack of evidence that the agreement of evidence had been considered and actioned and a lack of evidence that there had been any discussion between the Crown and the defence in relation thereto.

364. A useful tool in relation to avoiding the need to lead evidence at trial is the Statement of Uncontroversial Evidence (s258 Criminal Procedure (Scotland) Act 1995). The Best Practice Guide advises that these should be used where possible in summary cases and in view of the statutory timescales for challenge these should be served on the defence at least 10 days before the intermediate diet. This reinforces the point that intermediate diet preparation less than two weeks before the diet does not allow the Crown to meet their statutory obligations or internal guidance. In all the closed cases we reviewed we saw not one Statement of Uncontroversial Evidence. This starkly illustrates how underused this particular tool is.

Communication with defence

365. Another facet in relation to the agreement of evidence is the relationship and communication between the Crown and the defence. The prosecutor has a general duty to identify evidence which is capable of agreement and to take all reasonable steps to secure the agreement of evidence of the other party from the moment the accused pleads not guilty until the first witness is sworn.

366. In terms of the Best Practice Guidance where possible Procurators Fiscal should make proactive contact with defence agents, even by telephone, to discuss cases prior to the intermediate diet, particularly where the defence has not taken advantage of any opportunity to discuss the case with the Crown.

367. The thrust of summary justice reform was that the Crown should be proactive in relation to the agreement of evidence, as laid down in the legislation and echoed in their guidance.

368. We found a variety of approaches in relation to engagement with the defence in the offices we visited. There were some good practices which operated successfully and some areas, where despite valiant efforts by the Crown, to engage the defence seemed reluctant so to do.

369. In one office intermediate diet clinics and dedicated phone lines had previously been in place. However, the uptake from agents was so limited that they were not viable and so discontinued. The present arrangement in that office is that agents are now contacted on an ad hoc basis by the dedicated intermediate diet Fiscal. From the Crown perspective the defence seemed to adopt a last minute approach.

370. We were told of another office (not one of those inspected) which had gone to the extent of having an additional Fiscal available for discussion with agents within the court building while the intermediate diet court was ongoing. While this is, on one view, a little late in the day in terms of having agreement of evidence or indeed pleas agreed in advance of the intermediate diet, it was, however, intended to meet the needs of parties. Defence agents would be at court, they would have access to their clients who would also be in attendance, and, even had there been no opportunity to do so before, they would be in a position to discuss disclosure with their client, take instructions and therefore be in a position to have meaningful discussion with the Crown.

371. Where arrangements put in place by the Crown seemed to work best they tended to be based in the court building on the same day or very close (afternoon/day before) to the intermediate diet court. Overall we saw very little engagement from the defence in relation to discussing intermediate diets in advance. This was despite varying court cultures and physical arrangements. Where there was engagement it focused more on the resolution of cases by way of plea rather than on the agreement of evidence. There may well be an understandable frustration on the part of the Crown that despite efforts made and resources put in place, the uptake by defence agents is minimal. However, it does have a statutory obligation in relation to the agreement of evidence.

372. Looking at this from the perspective of the defence the picture is a little different. In discussions with defence agents around the country we were advised of various factors which assisted and encouraged them to engage with the Crown. Where meetings or discussions took place within the court building, they found this useful, the convenience factor clearly assisted here, together with the fact that if the meeting was on the same day as the intermediate diet, this allowed for discussion with their client. Defence agents also appreciated discussing their cases with experienced, dedicated intermediate diet court Fiscals. Their view was that resolution of a case was more likely to be effected by a Fiscal with some seniority/experience as these Fiscals seemed more willing or able to exercise some discretion in relation to their decision making.

373. In some offices the defence cited late disclosure as a difficulty and in some of the intermediate diet courts we visited this did seem to be borne out to a degree. The defence agents took the view that without disclosure they were not in a position to discuss the case meaningfully with their client. In one office the defence perception was that there was a lack of preparation on the part of the Crown and generally there appeared a perception that the Crown had insufficient time to prepare cases.

374. In many areas the defence complained of a lack of response to correspondence sent. This was an issue identified in our examination of closed cases. In the closed cases in 6 of the 8 offices we looked at we found evidence of unanswered correspondence from defence agents and other parties including witnesses, victims and complainers.

375. Many offices had put in place measures to allow for ease of contact with Fiscals including intimating direct line phone numbers etc. Despite this however agents still generally found difficulty contacting Fiscals (at times due to their unavailability as a result of court duties).

376. Agents took the view that both proactive calls from Fiscals and knowledge of the contact details of an 'allocated Fiscal' would assist.

377. From early 2012 (post our inspection visits to offices) the Crown was offering defence agents the opportunity to sign up to a new secure email service. Given the timing of this in relation to our inspection the impact is as yet unknown. It is anticipated that this will deliver savings in time and avoid the difficulties agents have contacting Fiscals by phone when they are involved in court duties. It is the intention of COPFS to move to a position over the next year where all disclosure and correspondence with defence agents and members of the Faculty of Advocates in relation to criminal cases is handled electronically.

Optimum time for legal case review

378. At present (under current guidance) the first legal review of initial legal instructions takes place at any time between two weeks and one day before the intermediate diet. Our view was that even two weeks before intermediate diet was too late. It seemed to us that what was needed was a holistic legal review of the case at the point when all the statements and productions (including CCTV) were to hand and about to be disclosed. Following such a review of the evidence, the letter accompanying full disclosure should propose areas for agreement and provide a named legal contact. Only by doing this would the Crown fulfil its statutory obligations for the intermediate diet.

RECOMMENDATION 14

We recommend that a holistic legal review of the case should take place when full disclosure is made to the defence including proposals for agreeing evidence and a named point of contact.

Advance notice trials

379. We said earlier that cases that merited some extra trial preparation were, for the most part, being identified at the marking stage.

380. These broadly fell into three categories: those which were complex due to the nature of the charges or the point of law which might need researched; those which involved high volume of witnesses and/or productions; those involving child or vulnerable witnesses whose evidence would require special measures.

381. The extra preparation work required for these trials varied. We found mixed evidence in our case reviews about the extent to which cases actually got the extra preparation that these factors merited. We identified

good practice in a couple of offices where dedicated Fiscals had the responsibility for certain types of advance notice trial.

382. In one office, for example, a dedicated Fiscal had the responsibility of preparing all the child witness cases. These were allocated to her from the first calling and she carried out all the legal work necessary to ensure that identification of the accused was secured to allow the child to give evidence behind a screen or remotely via CCTV. We understand that this good practice had to be discontinued due to changes in the way summary business was being managed in that office which was disappointing.

383. In another office we learned of a dedicated Fiscal dealing with all the benefit fraud cases. Early and effective preparation along with proactive engagement with the defence resulted in a fairly high ‘resolution’ rate in these cases.

384. Each office had systems in place for allocating advance notice trials to Fiscals where they had been identified. There were a range of ways in which Fiscals were notified that the case was allocated to them. In one office this was by hand delivery of the case file with a note instructing review by a specified date before the intermediate diet. Less formally others emailed the Fiscal concerned with a note of the allocation and left it up to the Fiscal to retrieve and prepare the case.

385. In some offices the legal manager carried out the allocations whereas administrative managers were responsible for doing this in other offices. We took the view that should be done by legal managers who would be aware of all that was involved in the preparation of such cases. They would decide the person best suited for the task taking account of development, expertise, recent experience, current caseload and court commitments.

RECOMMENDATION 15

Advance notice trials should be allocated only by legal staff and appropriate time allowed for their preparation.

386. It was not always clear that Fiscals being allocated advance notice trials were expected to have the preparation work completed before the intermediate diet court. Certainly, in those closed cases reviewed where the marking Fiscal had marked for ‘advance preparation’ we found little evidence of any actual preparation before the intermediate diet. Yet, given the importance of securing agreement of evidence and focusing the issues the time just before and at the intermediate diet is critical. We thought that opportunities were being missed especially in these sensitive, complex or bulky cases.

387. In one office recent restructuring of legal duties resulted in the creation of a team of senior and experienced Fiscals dedicated to trial management and especially designed to focus on such cases. At the time of our inspection we found that, due to staff shortages in that unit, those given that responsibility were simply not able to carry out the duties to any significant extent and described their day to day job as ‘fire-fighting’ with cases

imminently due on court. Indeed it was a common theme from legal staff interviewed that whilst the ‘advance notice’ label and allocation were good in theory, there was rarely enough time to carry out the preparation work that the case merited.

388. The main complaint from trial Fiscals around the country was that they did not have sufficient time to devote to the preparation of their trials. Where the need for ‘advance preparation’ was highlighted there seemed to be an expectation that Fiscals would simply make the time, for example where their trials courts finished early one day. Many Fiscals reported to us that this was simply inadequate for any meaningful and thorough case preparation. Some prepared cases at home in their own time.

Continuations of intermediate diets/churn

389. Churn refers to cases repeating steps in the process. Churn has been referred to in the media by High Court judges and been the subject of both internal and external scrutiny. The observation of live intermediate diets to assess reasons for their continuation was also the focus of some work by Criminal Justice Co-ordinators.

390. One aspect of churn is the continuation of intermediate diets to a further or continued intermediate diet.

391. The following table[23] shows the national statistics relating to the number of continuations at intermediate diet over a three year period to March 2012:

Table 4

Continued to Further Intermediate Diet			
	Number of related accused	**Continuations**	**%age**
2009/10	90,098	20,923	23.2%
2010/11	90,288	21,721	24.1%
2011/12 (to March 2012)	89,788	19,986	22.3%

392. The above figures show that (over the 3-year period) the percentage of continued intermediate diet cases has remained fairly static.

393. Although there is no formal internal COPFS measurement of the reasons for the continuations in one office we visited the District Fiscal monitored this and used the results to highlight particular issues to be addressed either at office level or with criminal justice partners. We recognise this as good practice. Another office carried out a review in September/October 2011 to identify reasons for continuations and findings showed a variety of causes including lack of forensic report and agents not downloading

[23] Source – Scottish Court Service

disclosure documents but it also showed improvements in citing witnesses and availability of CCTV. In another office Fiscals were asked to note reasons for churn on minutes for monitoring purposes. Staff in all offices told us that they were very aware of 'churn' and were trying their best to address the reasons.

394. In the context of intermediate diets, however, not all churn is bad. Cases can be adjourned from their first fixed intermediate diet to a continued/further intermediate diet without jeopardising the trial diet. The reasons for such adjournments are many and varied. Examples included evidence which had not yet been disclosed for the first intermediate diet but was being delivered the following day, an essential witness had not been cited and the Crown had a new address at which to cite or the Crown and defence believed that the case could be resolved and time was required to facilitate this.

395. 'Churn' of this nature can avoid pleas on the day of trial, lost court time due to motions to adjourn on the day of trial and, perhaps most importantly of all, the inconvenience and expense of victims and witnesses coming to court for a trial which will not proceed on that day. Even with robust systems in place for preparation of intermediate diets there are still imponderables and not everything is deliverable within the gift of the Crown.

396. If the situation means that the first trial diet cannot be sustained a motion to adjourn might be made at the continued intermediate diet/further intermediate diet but it will not have been for lack of effort on the parties behalf. If the case resolves in a plea, so much the better, if not, then the original date for trial remains available.

397. We spoke to Sheriffs and Sheriff Clerks in most of the jurisdictions we visited. Several Sheriffs advised that they would rather continue an intermediate diet than abandon the trial diet completely which is consistent with the position stated above. The general consensus was that preparation was key and that the Crown should be more prepared in order that the issues to be decided at trial were in narrower scope. Additionally the bench was broadly supportive and tending towards a more proactive approach at intermediate diets with consideration around case management.

398. In our closed and live reviews of cases we found that reasons for having a further intermediate diet were various, only some of which were attributable to the Crown. Common reasons for intermediate diet churn attributable to the Crown were in relation to CCTV, forensic reports or further expert evidence relating thereto or because of now known difficulties for witnesses attending court on the date fixed for trial. Lack of full disclosure was cited also, although this was more likely to be in relation to productions in general rather than statements.

399. Just as many cases seemed to churn at the intermediate diet for reasons outwith the control of the Crown. Indeed during a visit to one court there were 11 motions to continue intermediate diets. These motions were joint motions, defence motions, or by the court itself.

400. The reasons for such motions varied widely and included illness or absence on the part of the accused, obtaining of specialist reports, change of agency, late instruction of solicitor by client, awaiting or viewing CCTV, and, on occasion, awaiting or loss of disclosure.

401. Legal aid issues were cited also although we were unable to determine what the issues were in the closed cases. Certainly in 'live' intermediate diet observations these related to the accused's failure to co-operate in providing the necessary documentation in support of the application or change of defence solicitor and were not due to any delay on the part of the Legal Aid Board.

402. Where the accused failed to appear the Crown would normally seek a warrant to arrest the accused. At our live intermediate diet observations we noted some balanced decisions by Fiscals seeking to retain the trial where the agent thought that the accused had good reason for failing to attend. This would prevent the whole trial preparation having to be abandoned with consequent witness inconvenience.

Role of the sheriff

403. The importance of the role of the sheriff in relation to the management of court business was recognised in the McInnes report as previously referred to:

> "We recognise that many judges do not see themselves as having a role in managing court business. The idea that they might have such a role may be perceived by some as a threat to their judicial independence. They may say that each decision in each case has to be taken on its merits and that how a court performs overall is a reflection of the accumulation of many individual decisions. So, it may be said, there should be no constraints on them as impartial adjudicators in particular cases.
>
> We would not accept that judges do not manage court business. To the extent that management is about applying skills to make sure that things get done, judges play that role daily by exercising their judicial discretion."

404. Across the country there appeared to be a lack of uniformity in the approach by sheriffs. Some were very proactive while others were less so. We spoke to several about how they perceived their role in these courts. It was apparent that, depending on court loadings and their own workload, they could see that more Shrieval intervention may be of benefit. This was also reflected in some of our discussions with defence agents.

405. The role of the sheriff is critical in the conduct of the courts over which they preside and indeed often the conduct of those who appear in their courts reflects their attitudes and involvement, whether that be passive or proactive.

406. We observed one group, chaired by a sheriff, where a proactive approach was adopted in addressing and resolving problems at intermediate diet. This included the sheriff keeping track of individual cases and holding parties to account.

CHAPTER 7 – INTERMEDIATE TO TRIAL DIET

407. Where at the intermediate diet the case was simply continued to trial, the case would return to administrative staff with any necessary last minute follow up work instructed by the Fiscal in court that day. Follow up work in many cases was simply a continuation of the administrative processes set in place earlier in the case and any necessary chasing up of items still awaited. Where there were one or more continuations of the intermediate diet this could leave only a day or so until the trial.

408. In the rare cases where some agreement of evidence was intimated at the Intermediate court it was up to the Fiscal to prepare any Minutes of Agreement. We spoke to Fiscals carrying out the intermediate diets about their post intermediate diet work. Some had 'ring fenced' time to carry out any follow up work which enabled them to give the necessary time and attention to what was still needed to ensure the case proceeded as planned.

409. One Fiscal told us that it was only after the intermediate diet court that a real focus could be given to those cases still proceeding to trial (since there would be fewer cases in this category with pleas of guilty and warrants accounting for a proportion of the cases no longer proceeding). This is contrary to the ethos of front loading the work to ensure the trial is fully prepared and ready **before** the intermediate diet but is reflective of the current reality in many offices. We certainly saw in our case review of closed cases continuing notes by both administrative and legal staff as urgent work was done to get the case ready for trial (if not done earlier).

410. Where there was no such ring fencing of time for post intermediate diet work we heard that it was sometimes simply not possible for the intermediate diet Fiscal to prepare the necessary Joint Minute of Agreement of evidence before the trial diet. This was because of more pressing priorities of preparing a court for the following day or other reasons. Generally where there was clear agreement about a witness's evidence they were countermanded (their attendance excused) for trial.

Trial churn

411. Just as at intermediate diet the reasons for churn at trials were many and varied. There were still some (few) cases where the Crown was not prepared and a motion to adjourn was made. The most common reason for **Crown** motions to adjourn was because of the absence of (some or all) Crown witnesses in the case. We have already described in some detail the process of citing witnesses to attend court, whether by postal service or personal service. Unfortunately even when citations had been served some witnesses simply did not turn up.

412. Since we did not observe trial diets we are unable to comment on actual cases other than those reviewed after they had closed. Here we found evidence that in some cases the Crown sought and obtained warrants to arrest some witnesses who failed to appear. Differing practices were

evident around the country. One or two sheriffs commented on the Crown's failure to seek warrants and deal with them robustly.

413. In order to seek a witness warrant in court the trial Fiscal would have to produce evidence of proper citation and we were not clear whether it was common for Fiscals to have copy executions of witness citation in their trial papers. Some Fiscals told us of having to adjourn the court to seek these copies rather than having them to hand. The Crown's practice of storing executions of witness citation on a data storage facility on an IT system (Power Retrieve) means that they are not readily to hand in paper form for the court. It is best practice to have such paper proof of citation in court papers especially where witness difficulties are anticipated. Close liaison between legal and administrative staff would be essential just before the court to ensure these were to hand.

414. In some Sheriff Courts there was support available from the police to try to trace and bring to court on the day of the trial witnesses who had failed to appear. After early successes in courts where this practice was initiated we heard that it became progressively less successful as some witnesses (who were no strangers to court themselves) often made themselves scarce.

415. Where non-attendance of witnesses was perhaps down to error of forgetfulness a new pilot trying out the texting of reminders to witness's mobile phones may prove a useful additional tool in securing their attendance. This pilot is still to be evaluated. We heard that the PDSO[24] uses technology in this way to issue reminders to their clients about their court appearances.

416. Aside from the Crown motions to adjourn we found that just as many if not more reasons for churn at trial were down to the absence of the accused or on motion by the defence. Failure to appear at trial was common in every jurisdiction and inevitably resulted in a warrant to arrest the accused and the witness who had turned up being told to go home and await news of if and when the case would be set down for trial again. If on arrest the accused pled guilty that would be an end of the matter.

417. Defence motions to adjourn were for various reasons and may be concerning the availability or attendance of defence witnesses or concerning further investigations for the trial.

418. Another reason for churn at the trial, again evident in each court we reviewed, was the lack of court time. In practice there are a number of trials fixed for each court. Loadings of trials varied enormously. Some trials courts might only have a handful of trials and be very manageable. In one closed case we noted the exceptional position where a Fiscal noted on the minutes that the trial was adjourned though lack of court time, there being 16 cases set down for trial in the court that day of which 4 were priority custody cases. In reality the court loadings mean that there is simply not enough time to get through evidence in each of the trials.

[24] Public Defender Solicitor Office

Table 5

Continued to Further Trial Diet (no evidence led)			
	Number of related accused	**Continuations**	**%age**
2009/10	48,270	18,490	38.3%
2010/11	47,272	17,087	36.1%
2011/12 (to March 2012)	46,544	15,765	33.9%

419. The above figures show that there has been a slight decrease in the percentage of adjournments where no evidence was led, however, a third of cases are still being adjourned at the trial diet which suggests that there are issues impacting the process of business at trial.

CHAPTER 8 – CONCLUSIONS AND RECOMMENDATIONS

420. We set out to look at the timeliness and quality of Crown preparation of summary cases particularly in the light of the problem of 'churn'.

421. In particular we wanted to examine cases to see whether and to what extent prosecution practice was contributing to the delay in the disposal of cases and what external factors affected the prosecution.

422. As the 'face in court' the prosecution has to be responsible for not only its own actions (or inaction) but that of others.

423. The overall conclusion is that there are factors within the control of the Crown which do contribute to inefficiency and churn but also there are actions on the part of third parties and sometimes both operate together.

424. There is no failure of policy, indeed generally policies have been put in place which, if implemented, would deliver in full on the Crown's obligations to summary justice reform.

425. The main reason for the policy/practice gaps we found was sheer volume of business, well beyond, for example in the case of intermediate diets, what was considered reasonable in the McInnes Report.

426. A resounding feature is the degree of co-operation that now exists among criminal justice partners, the 'silo' mentality is long gone although some tension may exist in the area of end to end targets where overloading of the court may assist in target achievement but at the expense of quality.

427. We are very conscious of the financial landscape in the public sector and the need for the Crown (and others) to prioritise. Not unreasonably a large commitment has gone into dealing with serious crime but this has been to some extent at the expense of the 'bread and butter' work in the summary courts. These courts are where the vast majority of the public as witnesses/victims will interact with the criminal justice system and influence their views.

428. We noted that the summary case audits set up in 2010 were suspended in 2011 as COPFS restructured into Federations. The prescribed methodology was said to be too cumbersome and time consuming. However, only with an understanding of how and why cases do not proceed as planned can COPFS learn lessons for the future.

429. We recognise the reality that more resources are unlikely to be provided in the short term. Some would argue that self assessment is too resource intensive. However for COPFS not to continually critically assess their own work is false economy. A proper analysis of the reasons behind failed prosecutions or poorer than expected outcomes should inform better case marking decisions **and** more meaningful liaison with the police and other reporting agencies about the quality of prosecution reports. This should lead to a more discerning approach to case marking where only cases with a reasonable prospect of success are taken up and where those not meeting that standard are rejected at an earlier stage. Such an approach would increase the public confidence in the prosecution system.

430. **Strengths**

- Policies which are comprehensive and designed for improvement
- Comprehensive in-house guidance available to all at the click of a mouse
- An IT system which although slow at times works and is capable of development with good links to partners
- Committed staff often willing to go the extra mile and who value the overall purpose of the organisation
- A willingness to engage with criminal justice partners and seek improvements with greater understanding of each other's problems
- Some local good practices
- Greater awareness of victim/witness issues including interpreters properly arranged

431. **Weaknesses**

- Overloading of the system (especially in the numbers of intermediate and trial diets) hinders proper preparation
- Arguably the concept of 'front loading' of all cases when only a small percentage go to trial. This does not suit large or complex cases.
- Late and inadequate legal review of cases between the pleading diet and the intermediate diet
- Multi-stage tasks can defeat the system

RECOMMENDATIONS

RECOMMENDATION 1

We recommend revision of the method of requesting productions on FOS to enable a tick box option against each listed production in the SPR.

RECOMMENDATION 2

In situations where action is required in various stages such as obtaining and serving forensic reports, CCTV evidence, identification parades etc the Fiscal should instruct a diary entry on FOS and clear instructions as to the follow up stages needed. Ways of achieving this more easily on the IT system should be explored.

RECOMMENDATION 3

For clarity at the marking stage use should be made of only one method of suggesting to the defence what evidence could be agreed.

RECOMMENDATION 4

We recommend the creation of guidance in relation to reduction to summary clarifying what and by whom trial preparation is instructed.

RECOMMENDATION 5

We recommend that the Acceptable Plea position be retained but only 'in-house'.

RECOMMENDATION 6

We recommend more robust FOS audits be carried out to include trial preparation instruction.

RECOMMENDATION 7

We recommend discussions take place with ACPOS to encourage more recording of civilian witness availability.

RECOMMENDATION 8

Desk instructions should, if not available, be created and updated regularly.

RECOMMENDATION 9

We recommend COPFS measure target achievement in relation to witness citation.

RECOMMENDATION 10

Given its potential importance we recommend closer attention is paid to obtaining and disclosing previous criminal history records of witnesses.

RECOMMENDATION 11

We recommend the creation of a system to monitor performance on disclosure.

RECOMMENDATION 12

We recommend that efforts are made in liaison with Scottish Court Service to limit the number of intermediate diets to the recommended maximum of about 30.

RECOMMENDATION 13

We recommend the use of one standard method of recording administrative action for preparation of intermediate diets.

RECOMMENDATION 14

We recommend that a holistic legal review of the case should take place when full disclosure is made to the defence including proposals for agreeing evidence and a named point of contact.

RECOMMENDATION 15

Advance notice trials should be allocated only by legal staff and appropriate time allowed for their preparation.

RECOMMENDATION 16

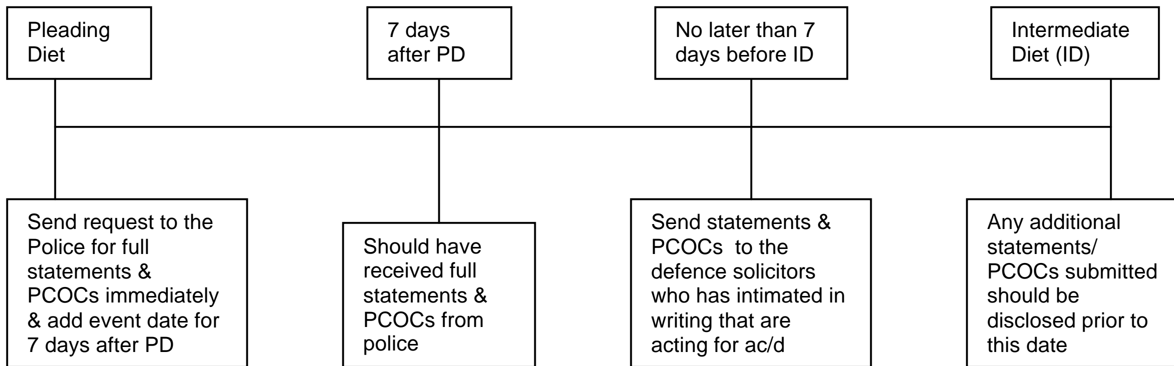
We recommend that a system of self assessment be put in place as soon as possible to enable in-house assessment of the quality of decision making and subsequent process.

ANNEX I

SUMMARY DISCLOSURE TIMELINES: OVERVIEW

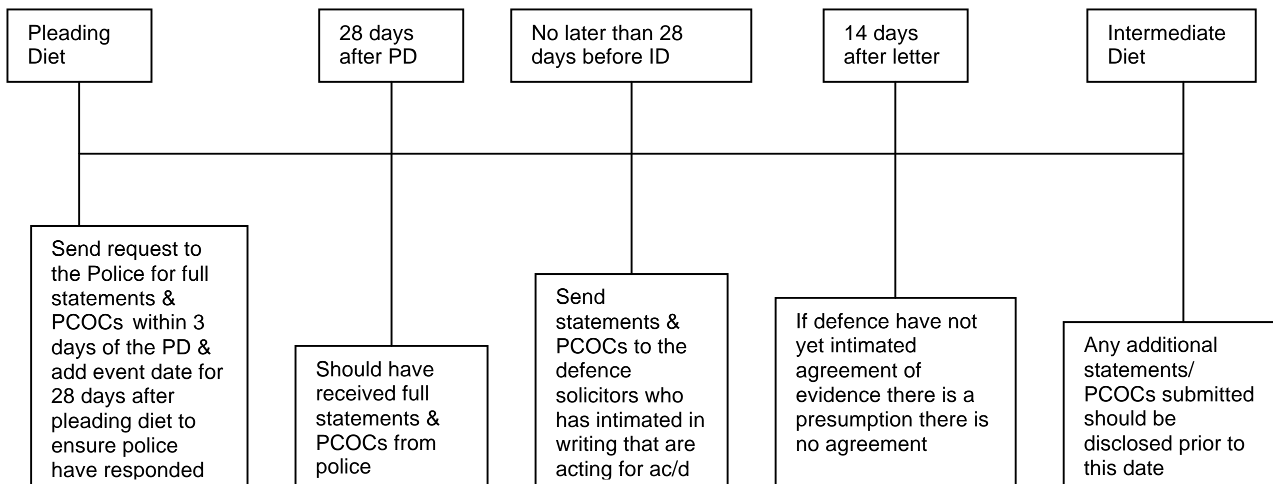
Custody Cases:

It is assumed that the time between pleading diet and intermediate diet is normally 2-3 weeks.



Bail Cases/Ordained to Appear:

It is assumed that the time between pleading diet and intermediate diet is normally 10-12 weeks.



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