Does mode of delivery make a difference to criminal case outcomes and clients' satisfaction? The public defence solicitor experiment

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Among UK criminal lawyers few subjects tend to give vent to as much passionate debate as the introduction of public defence solicitors. Although the public defender pilot has only recently begun in England and Wales, north of the border in Scotland the evaluation of the public defence experiment has recently been completed. This article explains some of the key findings on case outcomes achieved by "private" and "public" defence solicitors for similar cases; and also in terms of client satisfaction. In so doing, the research also raises broader questions about summary justice.

Overview

Over the last 25 years there has been increasing scholarly and official concern in the UK about the cost effectiveness and quality of publicly funded criminal defence services. Since the 1990s it has been the policy of governments in both Scotland and in England and Wales to confront apparent problems in the "judicare" system. In England and Wales a key policy, rolled out nationally in 2001, has been the use of contracting in which publicly funded criminal defence services can only be provided *Crim. L.R. 121 by private solicitors operating under contracts in which specified minimum quality standards are met. Alongside the policy of "contracting" private firms of solicitors, since May 2001 the government of England and Wales has opened eight Public Defender Offices in a mixed system of delivery as part of a four-year study. Although the public defender pilot has just begun in England and Wales, north of the border in Scotland the evaluation of a public defence solicitors scheme working in a mixed economy has recently been completed. This article discusses some of the key findings (especially in terms of case outcomes) of the study of that three-year pilot scheme in Scotland.

Few subjects give vent to as much passion among criminal lawyers in the United Kingdom as the introduction of "staff " or "salaried" lawyers to run alongside delivery by "private" lawyers. Vociferous debate about independence, quality, cost and client satisfaction accompanied the introduction of a three-year pilot scheme to test a new Public Defence Solicitors' Office in Scotland. Its introduction was accompanied by acrimony at both ground and senior level, with for example, the Edinburgh Bar Association excluding the PDSO from membership.

In 1998, the Public Defence Solicitors' Office ("PDSO") was established in Edinburgh. As part of a "mixed economy" the PDSO was intended as a pilot scheme to test and evaluate the provision of criminal assistance through solicitors employed directly by the Scottish Legal Aid Board. In its enabling legislation the Government was forced to make important concessions. The legislation gave the Board authority to set up a single office, employing no more than six solicitors, for an experimental period of five years. The Act also required that the experiment be independently monitored and a report had to be laid before the Scottish Parliament within three years of the start of the Office, setting out the results of the study.

In January 1999, following an exploratory methodological study, the authors were commissioned to carry out an independent evaluation of the PDSO. We were asked to compare the delivery of legally-aided criminal legal assistance through the PDSO with delivery through private practitioners in Edinburgh, paid on a case-*Crim. L.R. 122 by-case basis under the legal aid scheme. The comparison was according to four criteria:

• the quality of services provided (especially case outcomes);

• cost effectiveness;

• client satisfaction; and

• the contribution of each delivery method to the efficiency of the criminal justice system, including the impact on the courts, the procurator fiscal service, the police and the judiciary.

Due to space constraints, this article will be restricted to reporting on the results in relation to "quality": specifically case outcomes (limited here to conviction/acquittal and sentence); and secondly to client satisfaction. Findings on cost effectiveness and contribution to the efficiency of the criminal justice system are available in the full report.

Background

Proposals to experiment with a public defender scheme in Scotland date back almost a generation to 1980. The Law Society of Scotland, however, raised strong objections to the idea: public defenders would threaten the independence of the profession, interfere with the normal professional relationship between client and solicitor, and be unacceptable to the public. Other criticisms were that public defenders would work too closely with the prosecutor and put administrative convenience and cheapness before the interests of the accused. So, it was not until 1996 that a White Paper commented that rapidly rising cost of summary criminal legal aid "simply cannot be sustained". The White Paper used research (somewhat selectively) which showed that Scottish expenditure per comparable case was far higher than that in England and Wales. One of the proposed reforms was that the Scottish Legal Aid Board "should employ on fixed salaries a small number of solicitors to provide criminal legal aid on a pilot basis". The main advantage of such a scheme was not necessarily that it would be cheaper in itself but that it would provide an element of competition to private practice. In particular, it would provide a benchmark for what summary criminal legal aid should cost.

***Crim. L.R. 123 Outline of methodology**

Supplemented by questionnaire surveys and interviews with practitioners, officials and clients, the centrepiece of the research was a quantitative study of around 2,600 summary cases, drawn from court records. The aim was to compare a sample of PDSO cases with similar cases dealt with by private solicitors. We gathered information about case characteristics, how cases were processed through the courts and their outcomes (in terms of conviction and sentence).

The imposition of "direction": official expectation and practice

To help the PDSO rapidly build up its volume of casework, the government decided that the Scottish Legal Aid Board ("SLAB") should "direct" a random sample of accused people to use the PDSO. The sample was based on birth month. From October 1, 1998 to July 1, 2000, all January or February born people prosecuted under summary jurisdiction before Edinburgh District or Sheriff Court lost their normal entitlement to summary legal aid through a private solicitor. Instead, they were "directed" to use the PDSO.

This article follows the official terminology by describing those born in January and February as the "directed" sample, while describing those born in November and December as the "non-directed" sample. However, as predicted in the prior feasibility study presented to the government, the word "direction" was "a misnomer"[sic]. It was misleading, as it suggested that some neutral agency (such as SLAB or the courts) could "direct", even force, people to the PDSO. Despite a bullish official response to these warnings, "direction" was inherently flawed and doomed to fail.

Private solicitors strongly resented "direction". One solicitor described it in the following terms:

"The concept of direction was frankly, in my view, ludicrous … [My clients] would listen with astonishment to be told that because they were born in January or February, I was no longer able to be their solicitor … in legal terms. A lot of people were really very, very angry about that. Very angry indeed." *(Private solicitor interview 2000)*

However, many private solicitors soon began to find ways of complying creatively with the rules of direction but not its intention, and so successfully undermined its effect. The system of direction was (weakly) enforced only by preventing private practice solicitors from receiving certain forms of legal aid without a waiver. Private solicitors could obtain legal aid to act for a directed client provided they obtained a waiver. As if to add felt insult to injury, the person who exercised discretion over the use of the waiver was the Director of the PDSO! The result was that private *Crim. L.R. 124 solicitors tended to blame the PDSO Director personally for any unfavourable decision, thus aggravating an already acrimonious atmosphere.

The waiver system was heavily used: 59 per cent (252) of requests were granted. Of the four grounds for waiver, by far the most common, representing three-quarters of requests (187), was that the client "has a related matter being handled by his/her solicitors and there is good reason for continuity of representation". Even without a waiver, some forms of legal aid were still available to private practice solicitors acting for directed clients.

The feasibility study carried out before the PDSO opened found widespread discussion among the Edinburgh Bar about how far solicitors should continue to act for directed clients without being paid. A majority of those interviewed said that they would do at least some work for those born in January and February, even if they were not paid for it for one or more of the following three reasons. First, it was said to be a matter of principle: they would not let their clients down by forcing them to use

an “inadequate” service. For some, anyone taking a job there would automatically be a poor defence agent:

“I suspect … that the public defence solicitor's office will get duds. Nobody with any self-respect, nobody with ability who was obviously making it in the job I do would ever consider joining the PDSO.” *(Interview with private solicitor)*

Secondly, many firms had spent several years building up their client base, and there were good business reasons for retaining it--especially if the clients were likely to lead to more lucrative indictment work, or if the direction system was abolished after only a short time. Thirdly, some solicitors expressed a desire to subvert the pilot. When discussing the type of work they would do, solicitors emphasised that they would do unpaid work for “good clients”. By this they meant clients with whom they had a long-standing relationship who appeared regularly before the courts. Clients who generated solemn (indictment) work were particularly valued. Solicitors also suggested that they might send directed clients to the PDSO for the preparation on the understanding that clients would return to them for the trial.

“I will do the trial for nothing, but I won't do any preparation … They may have to go to court to represent themselves until the trial or they may go to the public defender.” (Private solicitor interview)

“[I will say] ‘if you come to me, you're going to have to pay' (and the majority can't afford that) ‘so you'll have to go the public defender. Go and see him and do everything you are asked to do, and then come to me the day before the intermediate diet … and I will get you to sign a mandate'. He will have done all the work … I will present the mandate and get all the papers, and I'll do the trial for nothing.” (Private solicitor interview)

Of represented clients, 60 per cent used a private solicitor for all or part of their case. A crucial implication of the low use of the PDSO by “directed” clients is that the case going to the PDSO would not necessarily produce the random sample that *Crim. L.R. 125 officials had imagined. We have dealt with the possibility of a non-representative sample in the types of cases reaching the PDSO by subjecting the data to multivariate analysis. In particular, our analyses that follow are broken down according to three groups: private non-directed; PDSO; “private directed”.

Comparison of process and case outcomes achieved by public and private defence solicitors

A major element of the evaluation was to look at the outcome of cases. We compared how public defenders and private legal aid solicitors processed cases through the courts and what impact this had on the result, both in terms of conviction and sentence.

Outcomes have been the focus of several Canadian studies comparing staff lawyers with their private legal aid counterparts. Reviewing research in Canada, the Canadian Department of Justice has stated that staff lawyers: spend less time per case than private lawyers; tend to plead clients guilty earlier and more often, *but nonetheless* achieve similar outcomes in terms of conviction and sentence.

Case trajectory: influences on solicitors

A common criticism made of Scottish summary procedure is that guilty pleas occur too late. From 1990 to 1995, the Scottish Office sponsored a research programme into summary legal aid. One of the central questions addressed by the research was how far the legal aid provisions influenced case progression. Did the differential payments between advice and assistance and summary legal aid encourage solicitors to advise an initial plea of not guilty, only to advise a change of plea before trial? Elaine Samuel argued strongly that most late pleas were driven by system factors rather than simply by solicitors' attempts to maximise their income through "supplier-induced demand".

The introduction of the PDSO allowed this vexed question to be revisited, affording greater methodological control than had been possible under a judicareonly system of payment. Comparing caseloads as a whole, would PDSO clients be more likely to plead guilty earlier than the clients of private solicitors?

Like other studies of the lower courts around the world, most people going through the Edinburgh summary courts plead guilty eventually. Among nondirected clients using the normal legal aid scheme, 76 per cent pled guilty, either in whole or in part; 11 per cent were abandoned by the prosecution and only 13 per cent went to trial. The plea rate for PDSO clients was slightly higher (at 78 per *Crim. L.R. 126 cent). However, this was not the main difference between the public and private solicitor client groups.

The main difference was that PDSO clients pled guilty *earlier.* PDSO cases were more likely to be resolved at the pleading diet or intermediate diet, and less likely to be resolved on the day of the trial, either before or after evidence was led. This finding was robust. In the court samples, 59 per cent of private non-directed cases were resolved at the pleading or intermediate diet, compared with 65 per cent of PDSO cases. When we used multiple regression analysis to control for known variations in cases, the difference widened. The analysis suggested that, had the PDSO dealt with similar cases to those handled by private solicitors, over 70 per cent would have been resolved at pleading or intermediate diet (a difference that is highly statistically significant at the 99 per cent level).

Advice on pleading

It has been suggested that public defenders might pressurise clients to plead guilty--a criticism that emerged from both the Canadian literature and from private practice solicitors in Edinburgh. In interviews PDSO solicitors described similar factors to other private solicitors: bail, the identity of the sheriff and the fraught nature of the court. They were at pains to point out that they would never pressurise a client to plead guilty against their will. However, they were also aware that they did not operate under the same financial incentives as private practice. One PDSO solicitor described a scenario in which a client offered to plead to two out of four charges:

"If I was a private practitioner, if I plead not guilty for him and he gets bail and I go along the next day to sort it out with the Fiscal's Office having got legal aid, I get paid £500. If I sort it out there and then at the custody court I might not get paid anything

or I'll probably get paid £25 for filling in a pink form. So I've got a choice--I can get paid £25 or £500. The case will take a couple more days to sort out, the client will be just as happy." (PDSO solicitor interview)

Interviews with private and PDSO solicitors revealed differences in tone and emphasis. Decisions over plea are complex and driven by a range of factors. Technically, the decision rests with the accused, but is influenced by advice from the defence solicitor who in turn is influenced by the actual or expected actions of the prosecution and the expected reaction of the sheriff. PDSO solicitors felt that they were now more focused on getting on with the case. On the other hand, we found no evidence to suggest that PDSO solicitors put explicit pressure on clients to plead guilty. None of our client interview respondents complained about being "pressured" to plead guilty. The only criticism made of the PDSO was that they were too neutral and too willing to go along with whatever the client decided. This view is consistent with the PSDO's insistence that

"the one overriding principle is that we would never make someone plead guilty that wanted to plead not guilty. If at the end of the day the client wants to plead not guilty and wants to go to trial, that's his decision." (PDSO solicitor interview 2000)

*Crim. L.R. 127 If the PDSO did influence their clients to plead guilty more often or to plead guilty earlier, it was through the lack of positive support to maintain a not guilty plea rather than through any direct pressure to plead guilty.

We asked clients whether their solicitor had advised them on how to plead: almost three-quarters (74 per cent) said that they had, a figure that was identical for both PDSO and private clients. There was, however, a sizeable and statistically significant difference between directed and volunteer PDSO clients: only 67 per cent of directed clients reported being advised about how to plead, compared with 82 per cent of volunteers. In our interviews, some directed clients complained that their solicitor had been too neutral: "I got the feeling that he was pleading not guilty solely on my behalf without any input at all." This also links in with solicitors' perceptions that the direction system meant that they were "living in a goldfish bowl" and had to be "very, very, careful in everything" that they said (PDSO solicitor interview).

So far the results are consistent with those reported by Canadian studies. "Staff" (public) lawyers tended to resolve cases at an earlier stage of the process than their private counterparts, usually through a guilty plea. The change in economic incentives involved in receiving a salary rather than a legal aid payment appeared to produce a change in behaviour, which, although difficult to detect in a single individual case, was measurable over comparable caseloads as a whole.

Do PDSO and private solicitors achieve different conviction outcomes?

What effect (if any) do earlier pleas have on the overall conviction rate? The Canadian studies found that although the clients of staff lawyers pled guilty more often, this had no effect on the conviction rate. It would appear that staff lawyers correctly predicted the outcome of cases, and only advised guilty pleas in cases that would have ended in a conviction in any event.

In Edinburgh the conviction rate was high for both samples. Most accused proceeded against summarily in the sheriff or district courts are convicted of at least something. We compared cases handled by the PDSO with those handled by private solicitors for non-directed cases. Given that the PDSO handled slightly different types of case, it was necessary to control for variations in case (including client) characteristics. Multiple regression analyses were conducted to identify what features led to no conviction as opposed to a conviction of some sort (whether as libelled or partial).Controlling for these intrinsic case factors, we found that PDSO cases were more likely to result in conviction. This contrasts with the Canadian studies (which did not control for intrinsic case factors or to a more *Crim. L.R. 128 limited extent). Controlling for intrinsic case features through modelling techniques, the odds of a PDSO client being convicted were 52 per cent higher than similar cases handled by private solicitors, a finding that was statistically significant at the 95 per cent level. In practical terms, such a difference means that, according to the model controlling for case variables, PDSO representation appears to have increased the chances of a client being convicted (of at least one charge even if reduced), from around 83 per cent to 88 per cent.

In general, there was a marked attrition effect. The longer an accused persisted with a plea of not guilty, the greater their chances of not being convicted. The chances that the prosecution would be abandoned were almost negligible at the pleading diet (at 2 per cent). They rose slightly at the intermediate diet (to 4-6 per cent), and became appreciably greater just before the trial started, when the prosecution discovered whether the witnesses had appeared. Among private, nondirected cases reaching the day of trial, 16 per cent of cases were abandoned. The chances of no conviction were highest after evidence had been led (at 38-44 per cent). PDSO clients who pled guilty at the pleading diet or intermediate diet exchanged the small but measurable chance of a later acquittal or the case being dropped for the certainty of immediate conviction for something, at least.

The quantitative data suggested that PDSO solicitors were more likely to conclude a case with a mixed plea: 55 per cent of all PDSO guilty pleas were mixed, compared to 50 per cent of all private, non-directed cases. However, when one controlled for case characteristics, the finding was only significant at the 90 per cent level.

Three-quarters of all pleas made just before trial were mixed, a rate that was similar for both PDSO and private solicitor cases. Thus, it seems that the PDSO was more pro-active in agreeing pleas earlier in the process. The effect this had on the total number of negotiated pleas was partially offset by the greater tendency of private solicitor cases to hold out until the day of the trial.

There was no great difference in the proportion of clients convicted at each stage of the process. Instead, the higher conviction rate was linked to the apparent PDSO tendency to facilitate *earlier* pleas of guilty. During interviews, both private solicitors and fiscals suggested that if one pushed a case to trial, there was a good chance that the prosecution would collapse. The main reason for waiting until the trial diet was that “you get a better deal just before trial”. A fiscal put this point clearly:

“A case goes through three stages: when you mark it [i.e. at the time of the complaint], you think, well, that'll prove. When you look at it later and cite the

witnesses etc you think, it might prove. And when you read it through at trial *Crim. L.R. 129 you think it will never prove. So it's always easier to [negotiate at the trial diet] and I think most defence agents will tell you that. The time for [the defence agent] to put the screws on to get a good plea is probably … on the morning of the trial." (fiscal interview)

The interviewee was correct. Most defence agents did tell us that busy fiscals, faced with more trials than they could possibly handle, were particularly amenable to lesser pleas immediately before trial.

There was, however, a downside to pleading guilty immediately before trial when all the prosecution witnesses had been forced to appear. Such strategies may irritate sheriffs. Several solicitors noted that sheriffs did occasionally object to such late changes of plea: "the sheriff might ask the witnesses into court and go through the lawyer like a dose of salts". Most felt, however, that this rarely trumped the benefits of a late plea. In the view of one solicitor, this sometimes amounted to "a bit of footstamping that isn't necessarily convincing". Another solicitor agreed:

"The sheriff still has to look over his back and think, well, I've got to sentence this person on what he did, and justify that to the Court of Appeal--and not lose my rag and say this is ridiculous." (Private solicitor interview)

Furthermore, solicitors could use a last minute plea bargain to divert the attention of an otherwise irate sheriff. On the day of trial, fiscals were often desperate to reduce the number of trials. As a fiscal put it: "we go to trial court with more cases than we can hope to prosecute, so we rely on some dropping out". Thus it was usually possible for a defence agent to secure some reduction in the complaint, even if it was only in deletions of minor words in the charges. This would be enough to show that the client was not pleading guilty as libelled. As one solicitor put it: "it gives you something to say" so that "you feel you don't have to explain why you didn't plead guilty until the trial diet".

Do public and private defence solicitors achieve different sentence outcomes?

Several Canadian studies have highlighted the fact that staff lawyers tend to achieve more favourable sentences for their clients. These differences reflected the fact that clients of staff lawyers were more likely to plead guilty earlier. By contrast, the Edinburgh data showed few discernible differences in sentence for similar cases. Both private non-directed and PDSO clients faced the same rate of imprisonment (15-16 per cent). When they were imprisoned, they received similar lengths of sentence (an average of 85-87 days). Nor could we find any difference in *the rate* at which more punitive sentences (either custody or community) were imposed, compared with the less punitive sentences of driving disqualification, fines or admonitions. If this is the case it appears, on the face of this evidence, that many clients are inclined to plead guilty partly because of an erroneous belief that they are likely to receive a discounted sentence for doing so.

From an international perspective, this is a surprising result given that PDSO clients were more likely to plead guilty at an earlier stage of the process. In other *Crim. L.R.

130 English-speaking jurisdictions, it is a matter of clear practice or policy that clients are normally awarded sentence discounts for co-operation with the system.

Unlike its counterpart south of the border, where, all else being equal, an offender in England and Wales *may* expect to receive a sentencing discount of up to one-half, the Scottish Court of Criminal Appeal has traditionally been wary of the idea of imposing more lenient sentences on those pleading guilty *as a matter of policy.* In 1987, the Court of Criminal Appeal remarked that sentence discounts were "an objectionable practice. What it involves is a form of plea bargaining … [where] an accused person is being offered an inducement to plead guilty early and in our opinion no such inducement should be offered". While discounting is generally considered permissible no system of sentencing discounts has been recognised and certainly not encouraged by the Court of Appeal. In 1995 an attempt to encourage earlier pleas of guilty, sentencers were explicitly given a discretion to taken into account "the stage in the proceedings … at which the offender indicated his intention to plead guilty" and "the circumstances in which the indication was given". The highly discretionary nature of the legislation contrasts with the apparently more directive provisions south of the border.

From this it might be supposed that little in the way of sentencing discount does take place in Scotland, particularly in the summary courts, as opposed to systematic and widespread discounting in England and Wales. The sheriffs and justices of the peace we spoke to said that they would never change the character (as opposed to the quantum) of the sentence because of an earlier plea (a point which has been barely developed by the Appeal Court in England and Wales).They would not, *e.g.* replace imprisonment with community service or community service with a fine. They said they might, on occasion, reduce the length of imprisonment or the amount of fine, but they found it difficult to quantify the effect. However, while the Appeal Courts north and south of the border have taken distinct approaches, it would not be accurate to paint a picture in which sentence discounting is rife in England and Wales *as a routine practice* and yet almost non-existent in Scotland. Indeed, recent research south of the border has revealed relatively low levels of compliance and patchy practice. Equally, it may be that discounting is widespread in Scotland but in specific kinds of cases and at specific stages, and how these work together with the use of backdating of sentences; the use of consecutive, concurrent and cumulo sentencing for different convictions; and, representations in presentence reports.

*Crim. L.R. 131 The PDSO Director told us that "our goal, by and large, is to keep clients out of prison". The Office did several things that one might expect to have led to substantial reductions in the use of custody. They resolved cases at an earlier stage, and were more pro-active in their negotiations with the prosecution. They also developed links with social work agencies and tried to make the maximum use of rehabilitation schemes. Within the Scottish context, however, this appears to have had little effect.

Clients' evaluations of public defence solicitors

Can criminal clients make valid judgments of their solicitors?

Whether or not it is in a client's best interests to “hold out” as long as possible, (possibly while remanded in custody), and endure the accompanying anxiety, or, plead guilty early to at least a reduced charge is highly debatable, but lawyers play a pivotal role in shaping that decision. Across the English-speaking world most of the literature on the relationship between defence lawyers and their clients has highlighted the passivity of clients whose wishes and expectations are managed by their defence lawyers. Studies of civil work also stress the importance lawyers place on managing their image with the client.

It may be therefore that clients tend to be in a poor position to judge their solicitors. However, there has been less work investigating what clients themselves thought. One of the largest qualitative studies of clients was carried out by Ericson and Barenek in an anonymous Canadian city. They described defendants as “dependants” in the criminal process, whose main characteristics were low expectations, forced trust and an inability to judge the service they receive. Failing any other means to judge the service, clients fell back on outcome as the main evaluative criterion. Where negative feelings were expressed, it was frequently because the outcome did not match their expectations. At the start of the PDSO study many solicitors dismissed the idea that their clients were capable of judging the performance of their defence lawyer; a point which sits uneasily with the great importance the same solicitors attached to client choice in selecting or returning to a defence solicitor.

However, the idea that clients judge mainly on outcome has been disputed. Large-scale quantitative work suggests that process--that is, the way that clients are treated by the system--is very important to clients. For example, Casper, Tyler and Fisher analysed data from those convicted of felonies in three US cities. They concluded that clients' evaluations of their treatment by the criminal justice process did not depend entirely on the sentence received: “rather their sense of fairness--in terms of both procedural and distributive justice …”.

In their study of legal aid clients in England and Wales, Somerland and Wall found that clients judged solicitors on a variety of interpersonal as well as technical *Crim. L.R. 132 criteria. Interpersonal criteria were judged highly important, a point which was strongly highlighted in the PDSO client interviews. Support, honesty and communication were all seen as crucial. Their study echoes research with matrimonial clients in suggesting that, unless solicitors established good rapport with clients, they would fail to elicit enough information to perform a technically competent service.

Our interviews with clients confirmed the important finding of earlier work that criminal accused are normally passive spectators in the criminal process. Clients described how stressful the experience was and how little they understood of it. They played only a small part in the process outside the court and were largely silent within it. Clients readily said that they could not judge the technical aspects of what lawyers did. Indeed, clients' judgements about their solicitors were not primarily made on the basis of outcomes but on assessments of how good their solicitors were at: listening to them; believing them; being able to explain the process; being accessible; “standing up for” them, etc.

Client confidence in their public defence solicitor before and after direction

We tested these client care issues by asking clients to rate their solicitor on five criteria. Two were about accessibility: "being there when I wanted them" and "having enough time for me". One was about listening; "listening to what I had to say" and two were about giving information: "telling me what was happening" and "telling me what would happen at the end". The levels of trust and satisfaction expressed by directed PDSO clients were consistently lower than those expressed by clients using private practitioners. Directed PDSO clients were less likely to say that their solicitor had done "a very good job" in listening to what they had to say; telling them what was happening; being there when they wanted them; or having enough time for them. They were also less likely to agree strongly that the solicitor had told the court their side of the story or treated them as though they mattered.

The influence of direction on client evaluations

The first point to emphasise is that criminal clients valued the right to choose their solicitor and resented being "directed" to use the PDSO. "Direction" appeared strongly to mediate their views of the PDSO. When asked whether they would use the firm again, only 46 per cent of directed PDSO clients said that they would, compared with 83 per cent of private practice clients. Direction appears to be a vital influence in the client satisfaction results. Many directed clients first found out about the PDSO from private solicitors. The interviews, together with comments on the client questionnaires, suggested that there was widespread confusion and incomprehension about the system of direction.

Even those who were otherwise very happy with the PDSO expressed some unease at their lack of choice. For others, however, the lack of choice undermined trust. They found it difficult to accept someone who had been forced on them.

*Crim. L.R. 133 "That's no due process, that no legal or anything like that … If you can't pick a lawyer and you're made to pick the Public Defender, you lose the trust … They work for the system." (PDSO client interview)

The negative effects of direction on solicitor-client relationships were also felt by PDSO solicitors:

Interviewer: How much difference do you think direction made to relationships with clients?

Solicitor: A significant difference. Clients did not come through the door shouting the odds about being made to come here, but undoubtedly clients did not like being directed, clients resent that … Clients were coming in, probably resentful of being directed, having probably been told on occasions to have low expectations …, so I think undoubtedly it affects client relations, but not in an overt way, not in the way that you can't manage the case … Having removed direction it reminds you again … how much better things are when you're dealing with a client who genuinely wants you to be his lawyer." (PDSO solicitor interview, November 2000)

Client evaluation after direction

We supplemented the main study of client satisfaction by sending questionnaires to those who had used the PDSO after direction ended in 2000. This allowed us to compare the responses of directed and private clients with a small sample of people who had used the PDSO *voluntarily.* The views expressed by volunteer clients were more positive than those expressed by directed clients, and, on the whole, were not hugely different from those of private clients. However, volunteers were still significantly less likely than private clients to agree strongly that their lawyer had told the court their side of the story or had treated them as if they mattered, rather than as "a job to be done". The low scores generated by PDSO clients were echoed in the qualitative interviews, which also raised concerns about listening, providing enough time and giving information about the case.

Volunteers were less likely to agree that the PDSO had "really stood up for my rights": only 48 per cent agreed strongly, compared with 71 per cent of private clients. The difference was significant at the 99 per cent level. PDSO volunteers were less likely than private solicitor clients to agree strongly that their solicitor knew the right people to speak to, told the court their side of the story, or treated them as if they mattered.

PDSO solicitors tended to be seen as more "business-like" and less personally committed than private solicitors.

"He seemed a very professional guy … business-like, polite. He seemed friendly … I wouldnae put the guy down. I don't think he done a bad job. I don't think he's done a great job either." (PDSO client interview 2000)

They were also less likely to say that they would use the firm again. On this crucial measure of client satisfaction, both directed and volunteer PDSO clients were significantly less likely to say that they would use the PDSO again. Forty-six per *Crim. L.R. 134 cent of PDSO directed clients, 60 per cent of PDSO volunteers, and 83 per cent of private clients said that they would return to the same firm. Directed clients were more likely to say that they would use another firm, while volunteers were more likely to say that they did not know what they would do.

The ability to explain the court system was also rated highly. 74 per cent of private practice clients thought that their lawyer did "a very good job" in listening to what they had to say and 21 per cent thought they did "a fairly good job". Only five private practice clients (3 per cent) said that their solicitor did "not a very good job" and two said they did "a very bad job". By contrast, 53 per cent of PDSO directed clients rated their solicitor as doing a very good job, with 32 per cent saying they did a fairly good job. The scores given by PDSO volunteers were between the two: 65 per cent said they did a very good job and 24 per cent said they did a fairly good job.

Reflections on the evaluation of case outcomes and client satisfaction

In terms of case outcomes, the data presented here summarise four key findings from the comparison of PDSO and private solicitor performance. These are:

(1) The PDSO was more likely than private solicitors acting for non-directed clients to resolve the case at the pleading diet or intermediate diet, and less likely to go to a trial diet.

(2) PDSO cases were more likely to end in a conviction for something than cases handled by private solicitors for non-directed clients.

(3) Even though PDSO cases were slightly (but statistically significantly) more likely to plead guilty and do so earlier than private solicitors, there was no difference for otherwise similar cases in the rate of custodial sentences imposed on PDSO clients compared with non-directed clients.

(4) After the end of direction PDSO clients and private solicitor clients expressed broadly similar levels of satisfaction, although clients tended to complain that their PDSO solicitor was "too businesslike".

From a managerial perspective, the fact that public defenders resolved cases at an earlier stage has advantages. It has the potential to save legal aid costs and also reduced court and prosecution costs, inconveniencing fewer witnesses. Clients were spared the wait and worry of repeated court diets and were less likely to be held in detention pending the resolution of their case. On the other hand, earlier resolution also led to a slight (but statistically robust) higher rate in convictions. By pleading guilty at the pleading diet or intermediate diet, rather than holding out until the day of the trial, clients substituted the certainty of conviction for the possibility that the prosecution case would collapse. A crucial mediating factor is the client's level of anxiety and attitude to risk.

What is particularly significant from the Edinburgh study is that it would appear that clients may not have benefited (in terms of sentence passed) from pleading guilty and doing so earlier than holding out to the trial. It would be useful to pursue this question further to see whether this apparent lack of overall sentence "discounting" masks specific types of cases where there may indeed be sentence "discounting".

*Crim. L.R. 135 This study also highlights that the decision about how to plead is not a simple matter of fact under the overall control of the accused/defendant. Despite the vociferous public denials by their leaders, in having to make ethically indeterminate judgements, solicitors appear to have been routinely influenced in significant part (albeit not exclusively) by the incentives under which they operate.

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A judicare system funds criminal defence services by paying each firm according to the legal aid case work performed. “Staff” or “salaried” lawyers are directly employed (*e.g.* by the legal aid board).

R. Moorhead “Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism” (1998) 25 *Journal of Law & Society,* pp.365-387.

The evaluation is being conducted by Lee Bridges, Ed Cape, Richard Moorhead, Avrom Sherr and Anona Mitchell.

Although a constituent country of the UK, Scotland has a separate system of criminal law from that of England and Wales, with appeals being heard by the Court of Criminal Appeal in Edinburgh (there is no appeal in criminal cases to the House of Lords). The legal profession of Scotland is separate from that of England and Wales, as is the prosecution service. In terms of jurisdiction, there are three levels of criminal courts of first instance. The High Court hears indictment/solemn cases which are tried by jury. The Sheriff Courts (presided over by sheriffs who are professional lawyers by background) hear both solemn (jury-triable) and summary (non jury-triable) cases. The district courts are largely presided over by lay justices and hear summary cases only. Unlike England and Wales, the “accused” person has no right to elect for jury trial.

Due to space constraints it is only possible to report and discuss a few of the most important findings relating to the performance of services (especially case outcomes) and also client satisfaction. See also T. Goriely (2003) “Evaluating the Scottish Public defence Solicitors' Office” (2003) 30 *Journal of Law & Society,* pp.84-101.

Now Legal Aid (Scotland) Act 1986, s.28A, ss inserted by the Crime and Punishment (Scotland) Act 1997, s.50.

T. Goriely, C. Tata, P. Duff, A. Henry, S. Anderson, E. Samuel, A. Sherr, R. Moorhead (1998) *Evaluation of the Pilot Public Defence Solicitor Project: Report of Feasibility Study,* presented to the Scottish Office.

Scotland has a distinct prosecution service. Summary cases are prosecuted by procurators fiscal and their deputes--colloquially known as “fiscals”.

T. Goriely, P. McCrone, P. Duff, M. Knapp, A. Henry, C. Tata, B. Lancaster *The Public Defence Solicitors' Office in Edinburgh: Independent Evaluation,* p.271, presented to the Scottish Parliament.

Royal Commission on Legal Services: Report, 1980. Cmnd 7846, HMSO Edinburgh.

"The accused" is the equivalent term for "the defendant" in England and Wales.

Scottish Office (1996) Crime and Punishment, para.6.11.

T. Goriely, C. Tata, A. Paterson *Expenditure on Criminal Legal Aid: Report of a Comparative Study of Scotland, England and Wales, and the Netherlands,* (HMSO, 1998). On the methodological issues of this and other such "comparative" spending research, see C. Tata "Comparing Legal Aid Spending: the Promise and Perils of a Jurisdiction-Centred Approach to (International) Legal Aid Research" in F. Regan *et al The Transformation of Legal Aid* (Oxford, 1999).

T. Goriely, C. Tata, P. Duff, A. Henry, S. Anderson, E. Samuel, A. Sherr, R. Moorhead (1998) Evaluation of the Pilot Public Defence Solicitor Project: Report of Feasibility Study. Unpublished report presented to the Scottish Office p.A-10.

D. McBarnet, "Creative Compliance and the defeat of Legal Control" in K. Hawkins (ed.) *The Human Face of Law* (Oxford, Clarendon Press, 1997), pp.177-198.

Soon after the establishment of the PDSO relations between it and private solicitors were very poor. The atmosphere in the defence agents' common room at court was characterised by hostility (including abusive graffiti) towards individual PDSO solicitors. This could be dismissed as the activity of a fringe element, but the decision of the Edinburgh Bar Association from membership conveyed an unequivocal message.

Canadian Department of Justice (1994). See also P. Brantingham, *The Buranby, British Columbia Experimental Public Defender Project: An Evaluation* (Department of Justice Canada, 1981).

E. Samuel "Criminal Legal Aid Expenditure: Supplier or System Driven? The case of Scotland" in R. Young and D. Wall (eds) *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press, 1996). On supplier-induced demand see A. Gray, P. Fenn, N. Rickman (1996) "Controlling Lawyers" Costs through Standard Fees: An Economic Analysis' in R. Young and D. Wall (eds) *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press, London, 1996); see also G. Bevan, T. Holland, M. Partington, *Organising Cost Effective Access to Justice,* Social Market Foundation Memorandum July 1994.

P.0.031.

The Manitoba evaluation, for example, found that, after controlling for prior record and type of case, 72.0% of staff cases ended with a conviction of some sort, compared to 71% of private clients (R. Sloan, *Legal Aid in Manitoba* (Department of Justice

Canada, 1987). Similarly, in the Burnaby experiment, 60% of clients of both the staff office and the local bar were convicted (Brantingham, 1981), *op. cit.*

Two features in particular that were significantly more likely to be associated with a conviction were prosecution in the sheriff court (as opposed to the district court) and multiple charges. Compared to road traffic cases, offences of violence were significantly *less* likely to lead to conviction. Cases with multiple accused were also *less* likely to result in a conviction. However, most offender characteristics (such as age or sex) did not affect the chances of conviction.

If, as discussed earlier, there were a bias against guilty pleas in cases reaching the PDSO, the effect would be even stronger.

One possible hypothesis, which the research south of the border is investigating, is that the difference in conviction rate could be explained by the relative criminal defence background of individual PDSO solicitors. For example, the conviction rates could vary between public defence solicitors who had well established private criminal defence businesses before entering the service and those who previously had to rely mainly on duty solicitor work. However, given the small numbers of PDSO solicitors (as specified in the legislation) it is not possible to make a meaningful comparison of this kind.

It was significant only at the 90% level, which means that there was a one in ten likelihood that the difference had occurred by chance.

In the Burnaby experiment, for example, 40% of private lawyer clients were imprisoned, compared with only 30% of staff lawyer clients. The Manitoba study found that staff lawyers achieved lesser sentences for broadly similar offences.

Strawhorn v McLeod, 1987 S.C.C.R. 413.

Criminal Procedure (Scotland) Act 1995, s.196.

s.152 Powers of Criminal Courts (Sentencing) Act 2000 . This is not to say that the discount in England and Wales is mandatory. All that is mandatory is that the court gives consideration to a discount and to give reasons if it does not. However, the situation is markedly more directive than in Scotland. On this specific point of reason-giving in England and Wales and compliance with this requirement see R. Henham "Sentencing Policy and Guilty Plea Discounts" in C. Tata and N. Hutton (eds) *Sentencing & Society: International Perspectives* (Ashgate, 2002), pp.370-398.

F. McCullum and P. Duff, *Intermediate Diets* (Scottish Executive, 2000).

R. Henham "Sentencing Policy and Guilty Plea Discounts" in C. Tata and N. Hutton (eds) *Sentencing & Society: International Perspectives* (Ashgate, 2002), pp.370-398.

R. Henham (*ibid.*).

A qualitative ESRC-sponsored study by Strathclyde, Glasgow, and Oxford Universities is now examining the influence of pre-sentence reports in Scotland, including plea and the use of pre-sentence reports.

A. Blumberg *Criminal Justice* (Quadrangle Books, 1967); A. Bottoms and J. Maclean, *Defendants in the Criminal Process* (Routledge, 1976); P. Carlen *Magistrates Justice* (Martin Robertson, 1976); R. Ericson and P. Baranek, *The Ordering of Justice* (University of Chicago Press, 1982); McConville *et al.*, *Standing Accused* (Clarendon, 1992); D. Rosenthal *Lawyers and Clients* (Russell Sage Foundation, 1974); A. Sarat and W. Felstiner, *Divorce Lawyers and their Clients* (Oxford University Press, 1995).

Ericson and Baranek (1982) p.89.

J. Casper, T. Tyler and B. Fisher "Procedural Justice in Felony Cases" (1988) 3 Law & Society Review, p.483 at p.503.

H. Somerland and D. Wall *Legally Aided Clients and their Solicitors: Qualitative Perspectives on Quality and Legal Aid* (Law Society Research Study No.34, London, 1999).

G. Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988).

p.0.001.

p. from 0.011 to 0.016.

In both cases, p.0.001.

M. McConville "Plea Bargaining: Ethics and Politics" (1998) 25 *Journal of Law and Society* 562-587.