

**A Sense of Justice:  
The Role of Pre-Sentence Reports in the Production (and  
Disruption) of Guilt and Guilty Pleas<sup>1</sup>**

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**ABSTRACT**

The criminal justice process in the lower and intermediate courts depends on defendants admitting guilt and being seen to do so voluntarily. Hitherto, there has been limited academic consideration of how Pre-Sentence Reports and their associated processes interact with the dynamics of guilty pleas. Drawing on recent research following-through the production, use and interpretation of a sample of reports, this paper concentrates on the discrepancy with which professionals are routinely confronted: namely, between their ideals of legal justice and the pragmatic daily reality in which they have to participate. How do legal professionals manage this felt discrepancy? The paper suggests that reports are vital to enabling professionals to process defendants in good, or at least not bad, conscience. In particular, reports pacify the unease felt by legal professionals that the everyday summary court processes may be too abrupt, abstract and impersonal. Reports and their associated processes pacify this unease in three ways. First, reports display to legal professionals that defendants are treated individually, and with a degree of respect and humanity. Secondly, report processes (including their anticipation) assist the management of defendants and help to facilitate the production of their guilty pleas. Thirdly, generally, (but by no means always), reports help to facilitate the sealing of 'closed' guilty pleas. In these three ways, the 'efficiency' of the mass processing of defendants via guilty pleas is enabled by a sense among legal professionals of the individualised justice which reports appear to display.

**Keywords:** Sentencing; pre-sentence reports; guilty pleas; mitigation; punishment; individualised justice.

## INTRODUCTION

The summary criminal justice process<sup>2</sup> of the intermediate and lower courts relies on guilty pleas. The fully contested trial is a relatively rare event. It is central both to the practical operation and to the legitimacy of the criminal process that the defendant's choice as to how to plead is seen to be made freely. However, in practice the freedom of that choice is limited. Research from several English-speaking countries<sup>3</sup> has shown that guilty pleas are also driven through a range of practices, including: a professional and policy 'ideology of triviality' enveloping cases in the lower courts (McBarnet, 1981); court workgroups and the incentives to maintain inter-professional relationships (e.g. Eisenstein and Jacob, 1991; Jacob 1983); lawyer advice (and its relationship with legal aid structures) (e.g. Goriely et al., 2001; Tata, 2007a); a pervasive culture of the presumption of guilt (e.g. McConville et al., 1994; Mulcahay, 1994; Sanders and Young, 2007: 443-494); and, rewards for pleading guilty in the (sometimes false) expectation that a reduced sentence will be given for a guilty plea (e.g. Tata et al., 2004). Research has also uncovered the important part played by the deployment of judicial demeanour and displays of emotion (e.g. Roach Anleu and Mack, 2005), as well as by the use of adjournments by judicial officers in facilitating the earlier production of guilty pleas (Roach Anleu and Mack, 2009). Yet, although a rich understanding has now been built up about the drivers encouraging guilty pleas, there has been only limited consideration of the increasingly important role of 'Pre-Sentence Reports'<sup>4</sup> (PSRs) in that process.<sup>5</sup>

Similarly, a parallel stream of research focusing on pre-sentence reports has paid little attention to the plea decision-making process. Rather, research into reports has attended to their explicit aims to: inform, advise and assist the sentencing court in its decision-making; and to be the main policy vehicle to encourage sentencers to avoid the use of custody where possible (e.g. Cavadino, 1997; Gelsthorpe and Raynor, 1995; Tata et al., 2008). In recent years attention has focused on the extent to which the changing content of reports may or may not be reflective of broader and more fundamental transformations in penal policy and penalty – specifically a shift away from individualised welfare judgements and towards 'actuarial justice' (e.g. Kemshall and Maguire, 2005; McNeill et al., 2009; see also the other papers in this

issue). As fundamental as these shifts may be, in this article I seek to spotlight the *unofficial yet crucial jobs which Reports also perform*.

The findings discussed here are drawn from a wider study whose main aim was to conduct a direct comparison between how sentencing judges interpret and use particular individual pre-sentence reports *and* what the writer of those same individual reports intended to convey (Tata et al., 2008). However, in this paper, I aim to illuminate the little-observed but (increasingly) central role of reports (and their associated processes) in the production and disruption of guilt and guilty pleas. I will explain how reports, (including their accompanying processes and their anticipation), largely, (but not always), assist the expedition and maintenance of guilty pleas. Yet, in largely facilitating the swift production of guilty pleas, reports and their processes also raise potentially awkward questions in the minds of criminal justice practitioners about the fairness and legitimacy of the summary process in which they are participating. Thus, justification is central to the ability to process defendants quickly (e.g. Mulcahy, 1994; Tata, 2007a), not least because lawyers and judges partly derive their elevated professional self-image from a sense of responsibility to and ownership of 'justice' (e.g. Abbot, 1988).

Reports and their accompanying processes often help to enable the defendant to be persuaded that to plead guilty is both in his/her interests and that s/he has been treated fairly. A basic way in which this is done is by providing the individual with a 'voice' to tell his/her story. Without a report and in the absence of a trial, that voice would be barely heard. In this respect, and in line with Tyler's 'procedural justice' theory (e.g. Tyler, 2003; Tyler and Huo, 2002), reports might be thought to play a key role in allowing the participation of defendants in the criminal process. Proponents of 'procedural justice' argue that the manner in which people are treated by law is as important to those people as the formal outcome. Being treated with courtesy and respect; regarded as an individual; allowed to participate in proceedings; listened to; and dealt with by people who seem to be trying to be fair – these are some key components of fairness upon which people subject to legal proceedings evaluate the process. Procedural justice theory highlights that satisfaction with law is, in fact, not largely determined by the favourability of the outcome. Tyler argues that such dignity of treatment should not be seen in opposition to 'efficiency' (getting through cases quickly). Instead, he argues, by treating people with respect and allowing them to

participate, they are more likely to cooperate, thus speeding up the whole process (e.g. Tyler, 2003).

While not disputing the value of procedural justice as the central way in which defendants appear to assess their experience, this paper suggests that the role of reports is not quite as straightforward and benign as procedural justice theory appears to imply. By giving people a 'voice' to tell their story the process *also* takes the risk of churning up uncomfortable questions about the legitimacy of the summary justice process.

Procedural justice theory is preoccupied with how people experience the legal process and how this affects confidence in law. This paper, however, is concerned with *how legal professionals regard their own role in the process..* To legal professionals the striking contrast between their ideals of legal justice and the daily reality in which they are obliged to participate is potentially discomfoting. . Thus, there is a tendency to strive to account for this apparent contrast through a range of beliefs and practices which justify the emphasis on the speedy disposal of cases (e.g. Bottoms and McLean, 1976; Feeley, 1979; McBarnet, 1981, Mulcahy, 1994, Tata 2007a). This paper argues that reports and their processes provide a central means by which to reconcile the potential felt gap between what legal professionals' regard as the 'ought' and the 'is' of legal justice.

Reports provide defendants with an opportunity to express their 'voice'. But in so doing, reports *also* affirm to legal professionals (lawyers and judges) the basic fairness of the process and their part in it. Legal practitioners are acutely conscious of their status as more than mere ordinary business people and that their work makes claim to a 'higher calling' (i.e. the ethic of service and duty to clients, and/or the public). But unlike other professionals they bear a double ethical weight: not only to 'the service ethic', but also to the overall 'interests of justice'. Unlike say accountancy or medicine, law *is* ultimately about the claim to justice. To be able to enjoy the elevated status as both 'lawyer' and 'professional', legal practitioners, (especially those dealing with vulnerable individuals day-in-day-out), need to regard their actions as ethical, or at the very least, not unethical. Being able to explain one's own actions as at least not inconsistent with 'justice' is central to the criminal justice case-work of which legal professionals must speedily dispose. Not being able to do

so diminishes one's own self-image and status not only as a professional, but also as a lawyer.

Thus, the central question raised by this paper is: how do justice (especially legal) professionals manage the glaring daily contradiction they continually encounter between their ideals of legal justice and what they see as the compromised reality of summary criminal justice? In answering this question the paper interrogates the roles played by reports in managing that felt, *subjective* sense of a gap.<sup>6</sup>

### **Pre-Sentence Reports in Scotland – Brief Context**

Pre-Sentence Reports are officially intended to assist the sentencing process. In Scotland<sup>7</sup>, such reports, commonly known as Social Enquiry Reports (SERs), are written by Criminal Justice Social Workers (CJSWs) primarily for judges considering sentence. Broadly speaking, criminal justice social workers carry out the equivalent functions performed by probation officers in other countries. In Scotland, SERs are written by CJSWs working within local authority social work departments, and (unlike the USA), these report writers are not employees of the courts. The sentencing court is only one among several audiences to which report writers have to attend. However, recent research in Scotland has shown clearly that despite the growth of risk-based managerialist drivers (e.g. Tombs, 2008), report writers see judicial sentencers as by far their most significant audience (Halliday et al., 2009).<sup>8</sup>

Typically, reports are called for immediately after conviction, (usually as a result of a negotiated guilty plea), and the court adjourns to allow for the preparation of reports in time for a separate sentencing hearing. Normally, the report is available to the sentencing judge and defence solicitor the afternoon before the sentencing hearing. Prosecutors in Scotland have little direct involvement with reports. In certain situations, (such as where the defendant is under the age of 21, or, where the court has not previously imposed a custodial sentence but is considering doing so), the law mandates an SER. In most other cases the judge has discretion to decide whether or not to call for a report.

In common with other jurisdictions (e.g. Haines and Morgan, 2007; Wandall, 2010), Scotland has seen a major escalation in the number of reports prepared for the courts.

For instance, between the years 2001 and 2006, there was an 80% increase in the number of reports compared with the equivalent period ten years earlier (Social Work Inspectorate, 1996). This dramatic rise is in spite of the fact that over this period the number of cases coming before the Scottish courts had been relatively stable (Tata, 2007a). It is estimated that in the mid-1990s 17% of summarily disposed cases were the subject of an SER request by the summary courts. But by the year 2000-1 it was 35.9% and by 2007-8 the rate climbed to 53.1%. This paper will explore one possible reason for this escalation, by suggesting that reports fill a role in the display of individualised justice.<sup>9</sup>

The research reported here focused on summary (i.e. non-jury-triable) cases in Scotland's intermediate Sheriff Courts – where around three-quarters of all criminal cases are heard. Sheriff Courts are presided over by judges known as 'sheriffs'. Sheriff Court judges ('sheriffs') are experienced lawyers by professional background.

#### *Legal Representation*

As we shall see, the judicial interpretation of reports is heavily mediated by defence lawyers. Legal representation for defendants (known as 'accused persons' in Scotland), in criminal proceedings is relatively widely available in Scotland, subject to a means and a merits test. Nearly all accused persons meet the means test. The most important element of the merits test is the 'likelihood' of a criminal charge, if proved, resulting in a custodial sentence and/or a loss of livelihood. All of the accused persons in the research, (which focused on 'cusp' cases where custody was a distinct possibility but not inevitable), received free representation by a lawyer. In practice, summary Sheriff Court cases are defended by lawyers known as 'solicitors' (who deal with criminal and civil cases in the intermediate and lower courts). Solicitors largely work in private firms. The firms receive payments from the state for the legally aided cases they work on. (Tata 2007a). Public defence offices are a relatively recent (and controversial) innovation (Goriely et al 2001) and they still handle a very small proportion of all criminal work.

## **RESEARCH METHODS**

The research examined report-writing from the perspective of both the report writers and the sheriff court judges and lawyers who read them. The aim of the research was to conduct an in-depth exploration of these communication processes. Accordingly, the project used entirely qualitative methods to try to understand these processes. It comprised four complementary parts:

1. *An ethnographic study of criminal justice social workers in two sites examining the routine social production of SERs.* This included the observation of social work interviews with individual accused persons. It also deployed the use of ‘shadow’ report-writing in which the field-based researcher prepared a ‘shadow’ (i.e. mock) report based on the same information available to the social worker who prepared the real report. This enabled a comparison between the ‘shadow’ report and the real report and proved to be a particularly valuable way of eliciting what the report writer intended to convey, (often implicitly), in specific parts of a particular report and the reasons for doing so (Tata et al., 2008). The two criminal justice social work offices served their respective local Sheriff Courts. These two sites were given the pseudonyms: ‘Westwood’ and ‘Southpark’.
2. *An observational and interview-based study with Sheriff Court judges* in the corresponding sites examining the interpretation and use of SERs in sentencing, including a follow-through of specific reports whose preparation had already been observed, and interviews with defence solicitors and prosecutors before and after those sentencing hearings.
3. *A series of focus group discussions with sheriff court judges throughout Scotland* discussing general and specific issues relating to specific SERs, including those already observed. The sheriffs were sent the case papers in advance and asked to review them in the same way in which they normally would.
4. *A series of moot sentencing hearings* with pre- and post-interviews with sheriffs and defence solicitors using anonymised case papers whose production and sentencing had already been observed.

The main sources of data comprised transcripts of five separate focus groups with sheriffs discussing specific cases; five moot sentencing exercise transcripts; 55 interview transcriptions comprising 22 social worker follow-up interviews, 17 post-

observed sentencing sheriff interviews, 11 one-to-one defence solicitor interviews, five moot pre-and post-observed sentencing interviews with defence solicitors, 10 court observation diaries, 43 weekly fieldwork diary returns, 29 shadow reports, and, 29 original reports with their attached papers. The main research participants were: 22 report writers, 26 Sheriff Court judges (sheriffs) and 11 defence solicitors.

Thus, the ability to follow cases from preparation through to sentencing enabled a direct comparison between the intentions of individual report writers and the use and interpretation of those individual reports by sheriffs and defence lawyers.

The findings in this paper focus on three non-official roles performed by reports. These are: the role of reports in affirming the legitimacy to legal professionals of the summary justice process; secondly, the role of report processes in the management of defendants (called 'accused persons'); and thirdly, the role of reports in enabling the production of closed guilty pleas.

## **FINDINGS**

### **I The Mollifying Role of Reports in Legitimizing the Process**

Summary legal processes are notoriously abrupt. Lawyers and judges are acutely aware of the disjuncture between the claims of deliberative due process as opposed to the daily pragmatic compromises of summary justice. In contrast to the mechanistic feel of the summary process, SERs play a vital expressive role in emphasising a display of individualised justice. They demonstrate that the criminal and penal process is not simply concerned with the offence but also with the whole person as a unique individual.

First, reports are a means of demonstrating to legal professionals the basic humanity of the legal process. Reports display the person not simply as another case, but as a unique individual who has a particular social history and personal circumstances – thus conjoining criminal justice with social justice. For instance:



But if [the sheriff] is looking at a full snapshot of somebody's life, he's seeing who the person in front of him really is. [...] It's humanising the person. [Interview, defence solicitor 6]

However, generally speaking, report information about personal and social circumstances tended to be regarded by sentencers as of marginal import to sentencing. This marginalisation occurred in two ways. First, SERs are the final document which sheriffs (and thus defence solicitors) read: they referred to it as 'the icing on the cake' *after* they had looked through the other more 'legal' documents. Thus they had already largely formed an impression of the case, which the SER was then unlikely fundamentally to alter.

Secondly, almost all sheriffs and defence solicitors paid scant attention to earlier parts of reports which tended to be regarded by legal professionals as 'biographical' in nature, and thus seen as 'detail' or mere 'background' and of little immediate use to sentencing. In contrast to policy aims, sheriffs and defence lawyers often said that they could often not see any connection between 'biographical' information and offending behaviour. Time and again, sheriffs and lawyers dismissed, (and occasionally ridiculed), the earlier sections of reports, describing them as 'exhaustive', or, 'encyclopaedic.' Most sheriffs and defence solicitors said that they 'scan', 'skim', or 'speed read' the early sections of reports. For example:

I read through the report and bluntly I skip quite a lot of the personal detail...[Interview, Southpark Sheriff Court Judge 1]

I wasn't very much interested in the fact that he had bronchitis as a child!<sup>10</sup> [sheriff Court Judge 1 focus group 3]

That little attention was paid to social and personal circumstance information is underlined by the fact that crucial points were often missed by legal professionals, or misunderstood (see Tata et al., 2008). Nonetheless, there is a paradox. Despite the fact that most skip-read and even derided earlier sections of reports, sheriffs and defence lawyers were *also* highly critical of reports which concentrated on offending and did not appear to set out sufficient detail about personal and social circumstances. An explanation for this apparent contradiction lies in the expressive value of the 'biographical' narrative. It appears to legal professionals to display a story of a unique individual, showing the process to be humane.<sup>11</sup> Reports (especially their early sections) *display* the sentencing process as open to and aware of 'context' and this way it becomes easier to achieve a sense of moral closure. In her recent youth

justice research, Phoenix (2006) found that youth justice professionals edit out social narratives of criminal responsibility (such as deprivation, lack of opportunity, discrimination, criminalisation, physical abuse, family breakdown). Likewise the study discussed here found that sheriffs said that they tended to become wearied by narratives about deprivation and social disadvantage. Sheriffs often remarked that such disadvantage was so commonplace in reports that it was not noteworthy. Thus, narratives about disadvantage (i.e. social explanations of offending) are thus largely marginalised, yet at the same time, indispensable to legal professionals' sense of justice.

## **II. The Role of Report Processes in the Management of Clients**

### **1. The role of reports in building lawyer-client rapport**

While report information about personal and social circumstances is regarded with a weary insouciance as largely irrelevant by legal professionals (but as expressive of individualised justice), some defence solicitors found an altogether different instrumental and commercial use. They consciously used reports as a tool to build rapport with and win the confidence of clients. In one firm, for example, solicitors 'remembered' the 'unique details' of individual clients' lives through the use of a database of previous SERs:

Solicitor: We keep the social enquiry reports and we store them on a database [...] And it's extremely helpful [...] If we haven't seen someone for a year, we can withdraw the SER and in two minutes flat, you have a full history of your client and you can then speak to the client on the basis that – 'How's your child getting on?' 'How's this, that, the next thing?' [...] So you know exactly what the client history is. [...] If I'm sending a solicitor to a prison and the solicitor's not seen the client before, he gets an old [Report]. By the time he hits the prison, he can speak to this client as if he's known him for a hundred years and he can also speak to the client in the sense that the client recognises that this solicitor has shown an interest: 'this solicitor knows about me'.[...] If I could put it another way, I would be prepared to pay for [SERs] as an outlay.[...] In fact, I've always been surprised we don't pay for them. [Interview, defence solicitor 8]

For some, this practice might be regarded as one of the ‘confidence tricks’ which lawyers play so as to maintain control over clients (e.g. McConville et al 1994). Yet research into client perspectives suggests that the expressive role of ‘client care’ cannot be divorced from the instrumental role of ‘case progression’. Summary clients willingly tend to accept that they are not in a position to judge the solicitor’s command of law, or overall advice. They do, however, tend to feel able to judge their defence lawyer on *process* issues (such as listening, being kept informed; treated with dignity; being remembered).<sup>12</sup> This underlines the point that unless the lawyer establishes good rapport with clients, s/he can fail to elicit enough information to perform a technically competent service, and indeed dispose of the case quickly. Not only could the maintenance of a database of SERs provide a commercial edge, it helped to progress the case:

A bit of rapport. Most clients actually, the complaint they have when they see someone who they haven’t seen before is that, ‘you don’t know my case’. The lawyer who goes in and says, ‘how are you getting on? I see you’ve got a – aye - how’s your kid, your kid’ll be at school now, four years, eh?. Your kid was at the nursery the last time I see you were in with Mr [name of solicitor firm colleague].’ He says, ‘Aye, aye, the kid’s doing well.’ *And you’re straight into the kind of the mind of the client.* [Interview, defence solicitor 8, emphasis added]

Thus reports are seen as a way to demonstrate clearly to clients that they are treated as unique individuals. In that way, reports are believed to play a reassuring function that someone cares about him/her as an individual and regards him/her as a whole person and not simply as a case number. This in turn assists efficient disposal of cases.

## **2. The role of reports in assisting ‘efficient’ defence work**

Drawing on the work of Everett Hughes, Hagan has suggested that rather than seeing the collection of information about the individual defendant as a rational division of labour, it is about reaffirming status relationships. “The judiciary reinforces its status by delegating to probation officers the ‘dirty work’ of collecting information for sentencing” (Hagan 1975: 623). Between 1949 and the early 1990s the provision of legally aided defence representation was significantly expanded in Scotland (Stoddart and Neilson, 1994), as it was elsewhere (Goriely, 1996). With that expansion, the inquiry, (rudimentary though it was), about the personal and social

circumstances and character of the individual came, in effect, to be delegated from judges to defence lawyers. More recently, this function is increasingly being displaced from defence lawyers to CJSWs. In research contemporaneous with the SERs study reported here, it was found that lawyer-client contact levels in summary cases have declined sharply as a direct consequence of changes to the structure of legal aid payments (Tata 2007a). This is particularly where a client is felt to be awkward, or, relatively demanding, or, has additional needs. In both that legal aid payment study and the study discussed in this paper many defence solicitors indicated that they felt a degree of embarrassment that their own levels of client contact were not as high as they would wish. However, the increasing incidence of reports appears to be filling that gap by performing a similar information-gathering function. For instance:

On a practical level sometimes you don't have as much time when you're doing summary criminal legal aid work as you perhaps should have with individuals and if that's the case then you might be in a position when you've only spoken to somebody for a few minutes. And this is a poor admission, but reflects [the] reality of working in a busy summary sheriff court. You might have to use the report and just really go through it, you know, and refer to aspects because you've not had enough time frankly with the individual, unfortunately. [Interview Defence solicitor 10]

it collates a huge amount of information and [...] placed in front of the sheriff to save us rehearsing all that in advance. [...] It also helps if the person's own solicitor is not present that day to do their report, to do their 'plea in mitigation'<sup>13</sup>. [...] That's maybe being a bit selfish, [...] it's convenient. But that's a fact of life in court operations. [Interview Defence solicitor 6]

Defence solicitors also explained that from their perspective reports speed up the process in other ways. First, they tend to obviate the need for a full plea in mitigation: many sheriffs are content to use the report as a proxy plea in mitigation. Secondly, report processes can be deployed to provide a disincentive to the client to take the case to trial. Clients who say that they wish to plead 'not guilty' and put the prosecution to proof can be and are presented with a dilemma by the defence solicitor in the event of being convicted. On the one hand, if innocence continues to be professed after conviction at trial, the chances of a community based disposal are likely to be severely reduced: the client can be advised to expect to be regarded as having been 'in denial'. On the other hand, if the client accepts and recognises his/her guilt after conviction at trial, the client can be advised to expect that s/he may be regarded as a 'chancer' or time-waster.

### 3. The Role of Report Processes in the Management of Client Expectations

Literature on lawyer-client relations has shown that, to a greater or lesser extent, lawyers manage client expectations (eg: Bottoms and McLean, 1976; Mulcahy, 1994; Flemming, 1986; McConville, et al. 1994; Tata, 2007a). Clients' expectations are largely (though not completely) set through them. Reports, in their processes, content, and deployment, are central to the management of client expectations.

First, report processes depress clients' 'unrealistic' expectations so increasing a sense of uncertainty. Defence lawyers felt it was important to disabuse clients of unrealistic expectations and report processes were seen as a way of highlighting that a custodial sentence was on the agenda. For example:

Normally I would be quite pessimistic with clients in terms of what was going to happen to them because it's an easier tool of dealing with the client thereafter if something bad does happen and you say, 'well look, you know, you were advised of it.' [...] If they've had the jail before the client probably knows how it works anyway and they'll be saying, 'oh I'll no' get reports here hopefully'. So if I think it's likely to be reports *or even a possibility* that it's reports I'll go through that procedure with them. [Interview defence solicitor 10, emphasis added]

Secondly, shaping the client's sentencing expectations through report processes can also encourage a sense of client satisfaction with the service s/he has received. For example:

And from a selfish element of the whole procedure, when you conclude a case, you want it to conclude. You do not want to get involved in appeals and if your client fully understands and he goes to jail for example, or he gets [electronically] tagged, he knows exactly why. [Interview, defence solicitor 8]

Thirdly, by emphasising the importance of the SER interview as an opportunity to 'sell' him/herself, the defence solicitor can deflect responsibility in the event that the client is disappointed.

As we have seen, earlier sections of the SER documenting the individual's personal and social circumstances were marginalised. Instead, sheriffs and defence lawyers focused on the latter sections of the reports: particularly the sections on 'attitude to offence and offending' and the 'conclusion'. Ironically these are the parts which were regarded by legal professionals as being least credible. However, it is precisely

because of this incredulity that these parts are focused on – a point to which we now turn.

### **III. The Role of Reports in the Production (and Disruption) of Guilt and Guilty Pleas**

Previous interview research with accused persons in Scotland has suggested that many summary clients claim to have pled guilty not because they believed they were guilty of the charges but in the expectation of extraneous benefits (e.g. sentence reduction for a guilty plea); emotional exhaustion (getting the process over); or lack of confidence in the impartiality of the process (Goriely, et al 2001). In addition, aside from questions of *legal* guilt or innocence, many regard themselves as *morally* not guilty or only partly guilty (eg: Bottoms and McLean, 1976; Goriely et al 2001). This tension between legal and broader moral conceptions of guilt is not only practically problematic to legal professionals, but also potentially morally troubling.

In this regard, to legal professionals the most important section of a report is about the accused person's 'attitude to the offence and offending', which portrays the person's account of the offence to which s/he has pled guilty and how that person now reflects on the offence. From the perspective of legal professionals the report introduces both opportunities and dangers. The main opportunity is to mitigate and dispose of the case without re-opening questions of guilt, innocence and legitimacy. The main danger is that the report might present an account of the offence which appears to be at odds with what the person has already pled guilty to.

#### **1. The pervasive potential of reports to disrupt the efficient production of legal guilty pleas**

Although we have seen that reports and the processes surrounding their production and use mostly facilitate and accelerate the production of guilty pleas, reports can *also* be disruptive. Defence solicitors were well aware that they would have to

explain in court an apparent inconsistency between the plea and the account by the client in the report. Defence solicitors and sheriffs explained this by suggesting that accused persons tended to be less honest with 'naïve' CJSWs than with lawyers. This was felt to lead all-too-easily into a flat denial, (frequently referred to as being 'in denial') of what the offender had already pled guilty to. For instance:

The sort of thing I'm talking about is things like, 'he pled guilty but he said he never did it', something like that. [Interview Southpark Sheriff Court Judge 2]

Partly this was seen as a tendency by the accused person to minimise responsibility for the offence to which s/he had pled guilty. Defence solicitors suggested the separate and greater problem of contradicting the guilty plea, which had already been negotiated and accepted by the prosecution. For example:

I suppose that the accused aren't the cleverest of people, and sometimes you have to sort of explain to them that what you really have to do is get across to the social worker that this is the position, you know. [...] But at the same time, it can get in the way at times of what's already been agreed by way of a plea. [Interview, defence solicitor 1]

## **2. Legitimation of the penal process and the imperative to 'close' guilty pleas**

What sheriffs frequently described as an 'exculpatory account' in the SER also presents an implicit and unwelcome challenge to the legitimacy of the criminal process, which 'makes life very difficult'. It must be addressed. For instance:

Sheriff: It can be very unhelpful actually because as you say you'll have had a plea of guilty [...]. And then the [SER] will indicate a [legal] defence [to the charge] presented by the offender. Now that makes life very difficult because I think the sheriff is duty bound in these situations where a plea of guilty has been tendered and then it's made apparent in the report that there may be a defence to say to the offender's [lawyer]: 'What is your client's position? Does he want to withdraw the plea of guilty?' You've got to explore that once it's been raised. You can't just leave it hanging there. [...] But the agent will almost invariably try and put that right. Otherwise it is disadvantageous to his client, because it looks as if he's still in denial. [Interview Westwood Sheriff Court Judge 5]

Sheriff: If [in the SER] the offender is saying 'well, actually I haven't done anything wrong', and is in denial, then it's difficult to work with the offender. And sometimes they'll say things like, 'I pled guilty because my solicitor told me to plead guilty but I'm not guilty'. And they're expecting you to dispose of the case on the basis that they're not accepting the guilt, which of course you can't do.[...] And if there's a major divergence between what the [prosecution] tell you and what

the defence tell you, or, what is revealed in the social enquiry report, then that has to be faced up to because I have to deal with it and sentence on the basis of the facts which are accepted. [Interview Westwood Sheriff Court Judge 7]

In such instances, defence solicitors were acutely aware that the guilty plea should not unravel in the SER interview. For this reason, and as we saw earlier, defence solicitors ‘home-in’ on the latter sections of the report, because it is imperative that they check that the explanation which a client gave to the report writer for the offence does not appear to contradict the plea of guilty. For example:

In certain circumstances if [...in] a difficult [guilty] plea whereby [...] you were sure in your own mind that the client was guilty of some sort of offence, but the client wasn't so sure, [...] and [after discussion] the client had [...] instructed you to plead guilty then [...] I would say to them, ‘if you say to the social worker you didn't do this or you're innocent then that will cause you problems and it'll cause me problems’. [Interview, defence solicitor 10]

Defence solicitors suggested that clients tend to confuse information which amounts to a defence of the charge/s with mitigation:

I think sometimes there can be a bit of confusion in the clients' minds because we sometimes get a situation where I think the client feels that, or doesn't understand the difference between mitigation and the [legal] defence [to the charge]. [Interview, defence solicitor 9]

From the perspective of the defence solicitor, it is crucial that clients who have pled guilty do not then provide an account to the report writer which is at odds with that guilty plea. Not only is this embarrassing, it may mean that the sheriff has to ask the defence solicitor whether the accused wishes to withdraw the plea of guilty and a trial date has to be set, or, (if the defence and prosecution versions of the facts cannot be reconciled) there would have to be a special hearing known as a ‘proof in mitigation’.<sup>14</sup> None of these scenarios were seen as welcome by court professionals. For instance:

Sometimes [the client's account to the social worker of the incident] can present a problem. [...] The reason I'd be focussing on that [ie: the section in reports on ‘attitude to offence and offending’] is the sheriff might say to me, ‘well, [title and surname of solicitor], you've a wee bit explaining here to do. This guy is saying that, and I'm thinking about there might have to be a Proof in Mitigation about this.’ So you want to avoid that sort of scenario where there seems to be some kind of difference or inconsistency between what I've already told the sheriff and what the guy's now telling the social worker because that does kind of present me with a bit of a problem. So I want to see that that's consistent. [Interview, defence solicitor 7]



Thus, it is imperative that the defence solicitor does as much as s/he can to manage a client's accounts of the offence to the report writer if there is a danger that it might contradict the guilty plea.

### **3. The role of report writers in facilitating the closure (and disruption) of guilty pleas**

The gullibility which lawyers and judges attributed to social workers was also felt to provide a source of direct insight into the mind of the individual. Social workers' supposed naïve and direct reporting of discussions with the accused was felt to make the report a particularly useful source of insight into the offender's attitude to the offence. In fact, observation of the production of reports and the shadow-report writing interviews showed clearly that social work report writers sought ways to encode their evaluative messages about the offender without appearing to be 'judgemental' and thus avoided encroaching on judicial territory (Tata et al., 2008). Yet because report writers were successful in leading sheriffs to believe that the report simply presented the offender's story transparently and without judgement, it meant sheriffs tended to feel they were also gaining an unmediated insight into the offender's character.

In contrast to this assumption of simple, naïve reporting, report writers played their part in massaging-out inconsistent accounts on some (but not all) occasions. For example, 'Patrick Swan' pled guilty, among other charges, to theft and to a separate charge of possessing an offensive weapon ("namely a lockback knife") in a public place. In the interview with his report writer ('Geena'), Patrick stated that he was carrying a screwdriver *not* a knife:

Patrick was paid back money so he bought some 'blues' [valium] with it. He always carries a screwdriver with him, [Geena later clarified that this was used for stealing], in a coat pocket. [Diary, SER interview observation, Westwood case 19].

On the face of it, Patrick's account to Geena was a denial of the most important element of what he had pled guilty to (carrying 'a lockback knife'). However, in her SER, under 'Offending', Geena transformed Patrick's account in such a way that it

would not be seen to be directly at odds with what he had pled guilty to while not mentioning that he had told her that was only carrying a screwdriver:

Mr [Swan] advised that he had an offensive weapon<sup>15</sup> with him when apprehended and reported that this weapon was used to access locked areas and that he had no intention of using it to harm [any] person. [SER 'Patrick Swan']

The shadow report-writing diary explains Geena's intentions:

Geena feels that by highlighting that the weapon was for the purposes of breaking into things rather than to be violent towards someone she is again highlighting the link between his drug use and his offending. [Diary, shadow report writing SER interview Westwood case 19]

It is perhaps ironic that while Geena endeavoured in her report to argue strenuously for a deferred sentence or probation, the crucial feature which, in the minds of sheriffs<sup>16</sup>, escalated 'the profile' of his case from 'a drug user' to 'possible dealer' was his conviction for possession of a knife. So while on the one hand, Geena may have assisted Patrick's case by glossing over his denial of what he had pled guilty to (i.e. she did *not* report that he denied that he was carrying a knife). On the other hand, the conviction for possession of a knife, (rather than a screwdriver), greatly escalated the seriousness of the case in the minds of the sheriff and made custody much more likely.

There were also instances where not only accused persons conflated a legal defence with mitigation, but so did report writers. For example, 'Carrie Villiers' pled guilty to assaulting a police officer; and a breach of the peace in a hospital. At the SER interview with her social work report writer ('Jodie'), Carrie is asked to explain the offences:

Carrie leans forward and tells Jodie that she is going to tell her 'stuff' but doesn't want it written down. [...] On her way [home] the police stopped her for 'no reason'. She struggled as they tried to put her in the car, and *she maintains they banged her on the head*. They however said she had done this. She received a head injury and as a result went to the hospital.

'Why were you shouting?' Jodie asks. Carrie explains that she was being dragged from the police car. She points to underarms and says she was covered in bruises because the police handled her so roughly. 'They were not handling you appropriately?'

Carrie shakes her head: 'no, they weren't.' Carrie admits she can't remember everything that happened, but she 'wasn't treated right'. She doesn't know why she was picked up in the first place.[...] Regarding the assault [she had pled guilty to], Carrie is unsure what happened [she had been drinking that night], but she looks shocked by the description of her biting the police officer: she 'didn't do that!' Jodie suggests that if she did bite him, there must be evidence, and

she should speak to her lawyer about that. [...] *Jodie tells her she should not have pled guilty to something she didn't do. Carrie looks at her: she tells her she 'just wanted to get it out of the way.'* [Diary, SER interview observation, Southpark case 15, emphasis added]

In the SER, under the section entitled 'offending behaviour' Jodie wrote:

In discussing the matter with Ms Villiers *she acknowledges her involvement in the offences.* [...] Ms Villiers states that she was en-route to the taxi rank when the Police arrested her. She reported that it was at this time when Police Officers were forcing her to enter the Police vehicle that *she banged her head* to injury and needed medical attention. [...] Exploring her attitude, Ms Villiers states that *she accepts full responsibility* for the Breach of the Peace and attributes her actions to having been under the influence of alcohol. *However, Ms Villiers indicated that whilst she pled guilty to the offence of Police Assault, she has no recollection of such actions.* [...] *Ms Villiers stated that at the time of the incident she felt angry and anxious for having been arrested and injured.* [SER – case 15 Carrie Villiers, emphasis added]

In the shadow report-writing diary interview, Jodie explains that she was trying to use the report to suggest scepticism about the charges against Carrie (which she has already pled guilty to). She was attempting to maintain two positions. On the one hand she sought to transform Carrie's account so that it was more consistent with what Carrie has pled guilty to. However, on the other hand, she attempted to hint that Carrie might not be guilty:

We move onto the offence account, noting that Jodie has mentioned that Carrie was injured entering the police car. Jodie explains that the sheriff would be wondering how Carrie ended up in the hospital in the first place [...]. *She thinks that it is important to tell the sheriff 'what, where and when' an event happened, to give Carrie's version of events.* [...] However, Jodie feels that by mentioning this, she is not only telling the sheriff 'what happened', *but is also giving the lawyer an opportunity to question what in fact took place that night. Jodie therefore is leaving it open for the lawyer to 'dig this out'* [...] If there was evidence that Carrie was mishandled, this is for her lawyer to raise this as an issue. Similarly in discussing the second offence Carrie has no recollection of what happened yet she pled guilty. Jodie then points out that unless the court has evidence that Carrie did indeed bite the officer [tails off]. She shrugs her shoulders. [Diary, shadow report writing interview, emphasis added]

Here, Jodie is seeking to alert the defence to "question what in fact took place that night." Jodie is leaving it open "for the lawyer to dig this out". Jodie questions whether the biting took place and wants the court to do so. Thus Jodie has attempted both to minimise the inconsistencies between Carrie's account and her guilty plea *and also* suggest to the court that the plea should be looked at again.

As we have seen, by giving the defendant a voice to express his/her story (i.e. display his/her confession and remorse) reports and report processes also create the pervasive possibility of denial *after* a guilty plea. Where that happens the fundamental assumption on which legal professionals in the summary process rely, (i.e. that people only plead guilty as a matter of free choice to what they know they are guilty of), is brought into question. Although an instance of an ‘inconsistent guilty plea’ is most acutely embarrassing to the defence lawyer who is expected to have delivered a ‘closed’ guilty plea, it also confronts other legal professionals with troubling questions about the legitimacy of the process. Pre-sentence reports largely facilitate the expeditious delivery and closure of guilty pleas, but also present the constant threat of resistance, (whether intended or not), by the defendant. In this way, pre-sentence reports largely legitimate the summary criminal and penal process, *but in so doing* present a pervasive menace.

## CONCLUSIONS

Previous research has devoted limited attention to the role of pre-sentence reports in the production, maintenance, and occasional disruption of guilty pleas. This paper suggests that such reports play a vital role in legitimating routine criminal and penal processes. Summary court processes are swift to the point of abruptness, relying heavily on the speedy delivery of guilty pleas. Their processes contrast with the rule of law values of careful fact-finding, and the dignity of the unique individual being protected against insidious state power – a contrast which can discomfort legal professionals. Moreover, most defendants tend to be passive in their own cases and have only a hazy understanding of what they have been charged with, and indeed, (especially after a negotiated plea of guilty), what they have pled guilty to. Further, broader intuitive notions of guilt and culpability through which defendants may interpret the events which have brought them before the courts often contrast markedly with legal conceptions of guilt and culpability on which the courts operate. All of these features combine to raise potentially uncomfortable questions in the minds of the professionals who constitute these processes.

Does the emphasis on getting through cases quickly and ‘efficiently’, therefore, mean that reports about individual defendants play no more than a decorative role? Are

reports largely irrelevant in the summary sentencing process – little more than a façade pretending to individualise justice? For example, in the US, Rosencrance (1988) and Hagan et al (1979) have argued that pre-sentence reports propagate a ‘myth’ of individualisation. In particular, they argue that the rise of presentence reports:

had more to do with the making of legal myths than with the restructuring of the way decisions are actually made....resulting in court practices characterized more by ceremony than substance. (Hagan et al 1979: 507).

Furthermore, in contrast to Tyler’s procedural justice theory discussed earlier, Hagan et al argue that “the goals of court efficiency and individualization are contradictory.”(524) This leads them to conclude that reports give the process the mere *appearance* of individualisation. “[T]he maintenance of the formal involvement of probation officers in the presentencing process allows perpetuation of the myth of individualization, if only in a ceremonial form.” (524) In a similar vein, Rosencrance (1988) argues that reports serve to perpetuate the myth of individualised justice, whereas in reality reports simply anticipate the likely sentence outcome on the basis of offence and previous conviction information (see also Kingsnorth et al, 1999).

Although personal and social circumstance information is often skip-read, misread, or ignored by legal professionals, at least in the Scottish summary process, reports are much more than empty ceremony. Even though reports are treated and used in ways not intended by their authors, reports in Scotland should not be “characterized more by ceremony than substance” (Hagan et al 1979: 507) or as “more ceremonial than instrumental” (Rosencrance 1988: 251). On the contrary, reports play a central and substantial role in Scottish summary guilt-production processes, *operating in simultaneously instrumental and expressive ways*.

Furthermore, this paper does not support the view that ‘individualisation’ and ‘organisational efficiency’ are simply “inversely related.” (Hagan et al 1979: 509). Rather, *individualising features of reports and their associated processes largely (but not invariably) assist the expeditious disposal of cases in four ways*.

First, report processes provide an opportunity to assist the management of clients by defence lawyers, including encouragement to plead guilty; the management of client expectations; and a way of building rapport with clients.

Secondly, the content of reports is generally heavily used by legal professionals. The way reports are used, however, often, (though not always), differs markedly from what report writers strive to communicate and how policy and practice literatures have supposed judicial sentencers read reports. But this does not mean that reports are irrelevant or marginal to the work of legal professionals. In Scotland at least, reports are increasingly central (both in their incidence; and in their uses) to everyday case construction – not least because reports are filling a gap left by the sharp decline in lawyer-client contact caused by legal aid changes. Legal professionals interpret and use reports as open-textured documents. ‘Facts’ in reports are used, selected, moulded and recast by legal professionals in the sentencing process (Tata et al 2008).

Thirdly, legal professionals tend to be preoccupied with the account of the offence and ‘offending behaviour’ in reports. Because report writers are widely imagined by legal professionals simply to summarise the account by the defendant, reports are seen to provide the direct insight into the moral character of the defendant. This account of the offence and offending behaviour is often pivotal to sentencing. Legal professionals seek to be assured that the account shows acceptance of culpability albeit mitigated, but without appearing to stray into a legal defence which could be seen to contradict the guilty plea.

Fourthly, although parts of reports, (especially the personal and social circumstances sections), may play a ritualistic role in emphasising values of individualised justice we should be careful not to dismiss this as irrelevant or meaningless. Reports provide sentencing professionals (most especially defence lawyers and judges) with a way of smoothing over the felt discomfort about ‘the gap problem’ between what is claimed for law and the daily reality. Thus, reports are not simply a matter of ‘empty ceremony’, but vital to the ability to dispose of cases in a way which does not appear to be contrary to justice. The ‘efficient’ production of guilty pleas depends on the ability of legal professionals to explain their actions not only to defendants, and to each other, but most crucially to themselves. In other words, *the instrumental depends on the expressive*. ‘Efficiency’ depends on legal professionals’ sense that

individualisation is not a complete fiction, but something demonstrable and real. In this way, the operation of 'individualisation' enables the 'efficient' disposal of cases.

Thus, one of the key roles which reports play is to legitimate the summary process by easing the concerns of legal professionals that defendants may not have been treated with sufficient care and dignity. While procedural justice theory highlights that there are strong reasons for treating defendants with dignity and respect, (not least because it enhances 'efficiency'), it is equally vital that professionals are able to reassure each other and themselves that they are taking part in a process which is, at the very least, not seriously unjust. Law is not merely an instrumental system of doing things, but also expressive about fundamental moral order (Hawkins 2003). (Legal) professionals need to feel reassured that they are constituting a process, which is basically fair (Feeley 1979). 'Efficient' processing of cases depends upon this expressive moral aspect and vice versa. If the claim to professionalism is to have any credibility then lawyers and judges need to regard their actions as ethically justifiable.

This conception of one's own actions is developed and played out in everyday work. Props and symbols provide resources for the display of humanity in daily sentencing work. In the sentencing process, reports perform such a function. All symbols in the social world have a plastic, bendable quality (Rose 1962). Indeed, this is all the more so in the case of reports. The fact that key evaluative messages are written in coded forms by report writers makes reports particularly open, malleable documents. Tata et al (2008) suggest that this encoded character is a consequence of professional territorialism. They argue that a judicial discourse of 'ownership' of sentencing requires that report writers have to navigate a narrow and uncertain course between not appearing to be judgemental, (since judgement is the territory of judicial sentencers), *and yet also* be able to provide a report which is 'useful' and 'relevant' to sentencing judgement. The only way report writers find they can achieve these contrasting requirements is to encode their judgemental messages.

*However*, this paper suggests that the encoded character of reports is *also a consequence of and assists* the smooth production of guilty pleas. Reports facilitate a display of humanity, which is essential if legal professionals' concerns about the abruptness of the process are to be eased. The encoded character of reports permits a multiplicity of (mis)readings. The ambiguity offered by encoded reports not only

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allows legal professionals to interpret ‘the facts’ creatively, but more importantly, it helps to allay their qualms about guilty plea-production processes.



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<sup>2</sup> ‘Summary justice’ refers to a procedure operating in the lower and intermediate courts hearing non-jury triable cases.

<sup>3</sup> English-speaking jurisdictions tend to be based on adversarial traditions. As work published in this issue (Beyens and Scheirs 2010; and, Field and Nelken 2010) shows, in inquisitorial systems the role of pre-sentence reports may not play such a central role as it plays in *formally* adversarial systems. In inquisitorial systems there tends not to be such a sharp (formal) distinction between trial and sentencing stages, and so information about the defendant’s personal and social circumstances, as well as moral character, may be the subject of explicit inquiry during the trial.

<sup>4</sup> Here ‘pre-sentence reports’ is used as a *generic* term to encompass reports used in different countries and jurisdictions with different names, but which nonetheless perform broadly similar functions. This generic term will be used interchangeably with ‘reports’.

<sup>5</sup> For instance, although McConville et al., (1994:198-210) advance a typology of patterns of mitigation, reports were not the central focus of their research. Shapland (1981) examined the construction of lawyers’ pleas in mitigation, but this did not examine reports as such. The recent study by Jacobson and Hough of ‘personal factors’ of offenders in the process of mitigation in the Crown Courts of England notes that the defence counsel’s plea in mitigation is “often built around issues highlighted by the pre-sentence report” (Jacobson and Hough 2007: 45). However, in a similar vein to Shapland’s study, theirs was not a study of reports as such, but rather of the role of ‘personal mitigating factors’.

<sup>6</sup> In this way I am seeking to focus on the *subjective sense* of the ‘gap problem’ among practitioners, ie: how legal professionals try to deal with the awkwardness they feel about what ought to happen and what actually happens. This is a different take on the focus of the famous debates about ‘the gap problem’ as an object of study in an *objective* sense (eg Nelken, 1981; McBarnet, 1981; Wandall, 2008). My aim here is rather to seek to understand the *subjective* sense of how legal professionals try to deal with the potentially troubling gap between what they think ought to happen as opposed to what they see happening, (including what their own role), in the summary justice process.

<sup>7</sup> Although a constituent part of the UK for many other matters, Scotland has always had its own system of criminal law and justice separate from that of England and Wales.

<sup>8</sup> Importantly, the same research has shown that, (in contrast to perceptions of judicial sentencers), report writers sought to resist in various (often subtle ways) the grand shifts from values of ‘welfare’ to ‘risk’ (McNeill et al 2009).

<sup>9</sup> Very precise estimates of the incidence of SERs as a proportion of summarily disposed cases are difficult to pin down. (Response by Scottish Government Justice Department to Freedom of Information requests made in 2009). The rise in the incidence of reports was frequently remarked upon by legal professionals and especially by the criminal justice social work managers. There are, no doubt, other factors which also explain the rise, such as the increased use of custody during this period.

<sup>10</sup> For the avoidance of doubt, there was no reference to bronchitis in the SER being discussed.

<sup>11</sup> Yet at the same time, the ethnographic study of those same reports has highlighted the typified constructions of report-writing as far from an exercise in unique individualisation (Halliday, et al 2008).

<sup>12</sup> E.g.: Goriely *et al.*, (2001); Kemp and Balmer (2008). Mack and Roach Anleu (2010) observe: “The manner in which a sentence is imposed can have more impact on perceptions of fairness and legitimacy than the actual sentence received.”

<sup>13</sup> A ‘plea in mitigation’ is the (normally short) speech given in court by the defence lawyer and addressed to the sentencing judge before sentencing.

<sup>14</sup> Roughly equivalent to a Newton hearing in England and Wales, or, an Alford Hearing in the US.

<sup>15</sup> In Scots law, possession of an offensive weapon in a ‘public place without lawful authority or a reasonable excuse’ is a criminal offence. The prosecution does not need to prove that there was intention to use the weapon to inflict injury. *Both* a knife and a screwdriver are examples of ‘an offensive weapon’.

<sup>16</sup> Both the sheriff who sentenced the case and sheriffs discussing the case in focus groups.