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Plea and Confession Bargaining in Scotland

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Fiona Leverick*

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Introduction

This paper describes and comments upon the procedures governing plea and confession bargaining in Scotland. It begins by providing some quite extensive background information about the criminal justice process in Scotland, before moving on to examine the various processes in Scots law by which a full trial can be avoided – both prior to the formal charge and subsequent to it. It concludes by evaluating these processes and exploring the prospects for future reform.

I. Organisation of Criminal Procedure (More Serious Crimes)

I.A. Pre-trial Stage

I.A.1. Form of criminal investigation

Prosecution of crime in Scotland is the responsibility of the Crown Office and Procurator Fiscal Service (COPFS).¹ Crown Office is the umbrella organisation, under which 48 local procurator fiscal offices operate (divided into 11 areas, each headed by an Area Procurator Fiscal). In Scotland, although the procurator fiscal is nominally responsible for the investigation of crime, the initial stage of a criminal investigation is normally undertaken by the police,² following a report made by the alleged victim or by another party. If, following their investigation, the police find evidence to suggest that a crime has been committed, a report may be made to the local procurator fiscal. The police are not required to report every instance of potentially criminal conduct. They are empowered to take no action or to issue an

* Senior Lecturer, School of Law, University of Aberdeen.

¹ The exceptions to this are so limited in Scotland that they can be safely ignored (with the exception of the right to private prosecution, which is dealt with in more detail in section I.A.2 below).

² In some limited circumstances, an investigation might be undertaken by another body (such as the Health and Safety Executive, an environmental health agency, or a trading standards agency) but the result of any such investigation is that it must be reported to the procurator fiscal.

informal warning. In addition, the prosecutor is entitled to direct the police not to report certain categories of criminal offence, if this is considered appropriate.³

The Scottish prosecution service operates under the principle of opportunity. This means that the procurator fiscal has discretion over whether or not to bring charges in a particular case and, in the event that charges are not brought, whether any of a number of alternatives to prosecution are used (on which, see below).

The prosecutor is not required to prosecute in every case in which there is sufficient evidence that a crime has taken place. Prosecution decisions are taken in a two stage process. If there is “sufficient admissible, reliable and credible evidence of a crime committed by the accused”,⁴ the prosecutor will only prosecute if to do so would be “in the public interest”.⁵ The COPFS *Prosecution Code* lists 13 factors that will be taken into account in deciding whether prosecution is in the public interest: the “nature and gravity of the offence”; the “impact of the offence on the victim and other witnesses”; the “age, background and personal circumstances of the accused”, the “age and personal circumstances of the victim and other witnesses”, the “attitude of the victim”; the “motive for the crime”, the “age of the offence”, “[m]itigating circumstances”, the “effect of prosecution on the accused”, the “risk of further offending”; the “availability of a more appropriate civil remedy”; the “powers of the court”; and “[p]ublic concern”.⁶

Should the prosecutor decide that prosecution is not in the public interest, he may decide simply to bring no proceedings;⁷ or he may decide to use one of the various alternatives to prosecution available to him. There are a number of alternatives to prosecution, all of which are listed in the *Prosecution Code*.⁸ The prosecutor might decide to issue a “written or personal warning”, making it clear that “repetition of the alleged behaviour will be likely to result in prosecution”.⁹ He might decide to issue a “fiscal fine” or a “fixed penalty” (both of which are discussed in more detail in section IV below). He might opt for diversion from prosecution: the referral of the accused to “the supervision of a social worker, psychiatrist, psychologist or mediator for the purposes of support, treatment or other action”¹⁰ (discussed in more detail in sections V and VI below). Finally, if the alleged offence has been committed by a child, the prosecutor may refer the case to the Scottish Children’s Reporter.¹¹

Scottish criminal procedure is a predominantly adversarial system. Thus once the accused has been charged with a criminal offence, he (or more commonly, his legal representative) is

³ See the Summary Justice Review Committee, *Report to Ministers* (2004), para 8.6.

⁴ Crown Office and Procurator Fiscal Service, *Prosecution Code* (2001), at 4. This part of the test is different to that used in England and Wales, where the Crown Prosecution Service uses the test of whether there is enough evidence to provide a “realistic prospect of conviction” (*Code for Crown Prosecutors* (2004), para 5.2).

⁵ *Prosecution Code*, at 6.

⁶ *Prosecution Code*, at 6-8.

⁷ This is, as the *Prosecution Code* notes (at 9), the *only* appropriate action where there is not sufficient evidence.

⁸ At 10. For figures on the frequency of use of the various alternatives to prosecution, see section I.A.2 below.

⁹ At 10.

¹⁰ At 10.

¹¹ In Scotland, children who are suspected of having committed a criminal offence are dealt with under a separate system of children’s hearings. These were established as a result of the Kilbrandon Committee’s *Report on Children and Young Persons, Scotland* (Cmnd 2306, 1964) which espoused the philosophy that a child who commits an offence is a child in need of care and protection and thus, in the vast majority of cases, should not be dealt with in the adult courts. The Committee’s recommendation that a special system of children’s hearings be set up was put into practice in the Social Work (Scotland) Act 1968, which came into force in 1971. The relevant law is now contained in the Children (Scotland) Act 1995.

entitled to conduct his own independent investigation, with a view to collecting evidence that will cast doubt on the prosecution case. The accused has a right to present this independent evidence at his trial.

There is no procedure whereby the victim can conduct his own investigation and the victim is not legally represented at trial, nor can he present his own evidence. Cases are prosecuted by the procurator fiscal¹² and the role of the victim, aside from reporting the crime, is limited to giving evidence as a witness, if the case proceeds to trial (which only a minority of cases do – see section VII below).

It should also be noted at this point that Scottish criminal law is primarily a common law system. It does not have a criminal code. Most crimes (or at least those at the relatively serious end of the spectrum) are common law crimes; that is, they have no legislative foundation and have emerged from a combination of the work of ‘institutional’ writers and the decisions of judges in higher courts. Some of the criminal law of Scotland does come from legislation, most notably the majority of drugs offences (the Misuse of Drugs Act 1971, as amended by subsequent legislation) and road traffic offences (the Road Traffic Act 1988, again as amended by subsequent legislation).

I.A.2. Confessions and admissions as proof of guilt: interrogation practice

At the stage of the initial investigation, it is permissible for the police to question suspects. A suspect may be detained without charge for questioning at a police station, but only for a maximum period of six hours.¹³ The suspect is entitled to have a solicitor informed about his detention,¹⁴ but has no right to have a solicitor present during questioning. However, if a confession is obtained from the accused where he has not been allowed to consult with a solicitor, this may result in the confession being inadmissible as evidence, especially if the suspect is vulnerable or has been charged with a very serious offence.¹⁵

The accused has the right to remain silent during police questioning. He has no obligation to answer any questions other than to give his name and address and must be informed of this right.¹⁶ Unlike in England and Wales,¹⁷ no adverse inferences can be drawn from a refusal to answer questions at police questioning stage.¹⁸ Since no adverse inferences can be drawn from silence at this stage, the absence of a right to have a solicitor present during police questioning has been held not to breach Article 6 of the European Convention on Human Rights (the right to a fair trial).¹⁹

Where the accused has not been informed of his right to silence, it was thought at one stage that this would automatically mean that any confession made by him would not be admissible at trial.²⁰ More recently, the view taken by the courts seems to have been that the absence of a

¹² With the exception of the very limited right to private prosecution (on which, see section I.A.2 below).

¹³ Criminal Procedure (Scotland) Act 1995 s.14(2).

¹⁴ Criminal Procedure (Scotland) Act 1995 s.15(1).

¹⁵ *HM Advocate v Aitken* 1926 JC 83. For discussion, see AG Walker and NML Walker, *The Law of Evidence in Scotland* (2nd edn, 2000 by ML Ross with J Chalmers) (subsequently “Walker and Walker”), at para 9.18.

¹⁶ Criminal Procedure (Scotland) Act 1995 s.14(9).

¹⁷ Criminal Justice and Public Order Act 1994 ss. 34-35.

¹⁸ For a recent case confirming this, see *Larkin v HM Advocate* 2005 SLT 1087.

¹⁹ *HM Advocate v Robb* 2000 JC 127; *Paton v Ritchie* 2000 JC 271.

²⁰ *Tonge v HM Advocate* 1982 JC 130.

caution is simply one factor to be taken into account in an overall consideration of whether it would be fair to admit the confession.²¹

Law enforcement officials are not allowed to bargain for confessions during the pre-trial stage by offering release from custody or any other favours. If this was to occur, it is likely that any confession obtained would be deemed inadmissible by the court at trial, as a confession made as a result of threats, inducement or undue influence is generally inadmissible.²² This principle has been interpreted rather unfavourably (from the perspective of the accused) at times. In one case, the police arrived at the door of a woman who was suspected of theft and asked her to accompany them to the police station for an interview. She was at home with her young children at the time and no-one else was available to look after them. She was told that they could be taken into the care of a social worker, and she could be forcibly detained, but that this could be avoided if she made a statement immediately. Immediately after being told this, she confessed. This was held not to be an inducement and thus her confession was admissible evidence at her subsequent trial.²³

The decision on whether there is sufficient evidence to charge a suspect (and, because Scotland operates under the principle of opportunity, whether or not prosecution would be in the public interest) is made by the procurator fiscal with no involvement of the court. The only exception to this is that the court has the power to prevent a prosecution from proceeding where it would be “oppressive” and/or where there is “a material risk of grave prejudice to the accused”.²⁴ The court will, however, take this course of action “only with the greatest reluctance”.²⁵

Other than this, there are very few, if any, limits to prosecutorial discretion. A degree of accountability is present in the system, as local prosecution offices are required to provide figures on their rates of prosecution (and the use of the various alternatives) to the Crown Office. These figures, in aggregate form, are made publicly available via the COPFS website and are shown in table 1 below.

Table 1: Use of no proceedings and alternatives to prosecution

	2002-03	2003-04	2004-05
Total cases reported	304,000	321,340	323,016
Decision to prosecute	202,871 (66.7%)	229,796 (71.5%)	186,302 (57.7%)
No proceedings	51,133 (16.8%)	43,702 (13.6%)	60,706 (18.8%)
Warning letter	15,928 (5.2%)	21,920 (6.8%)	32,150 (10.0)
Fixed penalty	5,964 (2.0%)	8,690 (2.7%)	9,847 (3.0)
Fiscal fine	24,084 (7.9%)	30,029 (9.3%)	22,780 (7.1)
Diversion	9,511 (3.1%)	12,615 (3.9%)	11,231 (3.5%)

Source: Crown Office and Procurator Fiscal Service website (<http://www.crownoffice.gov.uk/About/corporate-info/Caseproclast5>)

²¹ *Pennycuik v Lees* 1992 SLT 763; *Williams v Friel* 1998 SCCR 649.

²² See, for example, *Harley v HM Advocate* 1996 SLT 1075. See also Walker and Walker, para 9.14.

²³ *Stewart v Hingston* 1997 SLT 442.

²⁴ *HM Advocate v Stuurman* 1980 JC 111; *Mitchell v HM Advocate* 2003 JC 89. Whether both oppression and a risk of prejudice to the accused are necessary before a court will prevent a prosecution from taking place is unclear: see chapter 19 of J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006).

²⁵ *HM Advocate v O'Neill* 1992 SCCR 130.

As table 1 shows, the proportion of cases reported to the procurator fiscal in 2004/05 (the most recent year for which figures are available) in which a prosecution took place was 57.7%, a clear decline on the two previous years' figures of 71.5% and 66.7%. This decline is accounted for primarily by an increase in cases in which no action was taken and in the use of warning letters. While not broken down by the level of each individual procurator fiscal office, the Crown Office does break down the figures for no proceedings by local police region (of which there are seven in Scotland) and this reveals quite considerable differences between regions. The highest rate of no proceedings for 2004/05 is found in the Lothian and Borders region (22.1%) and the lowest in the Grampian region (9.4%).

Where the prosecutor decides that no proceedings are to take place, he is required to record a reason for this decision, although this does not amount to much by way of scrutiny as it simply involves indicating which of a number of pre-specified reasons applies to the case. Once again, figures on this are collected by the Crown Office and are made publicly available at aggregate level (see table 2 below).

Table 2: Reasons for no proceedings 2004/05

Reason	
Insufficient evidence	12,776 (3.9%)
Further action disproportionate	19,129 (5.8%)
Civil remedy more appropriate	2,157 (0.7%)
Mitigating circumstances	3,386 (1.0%)
Delay by police in reporting	7,759 (2.4%)
Delay by procurator fiscal	173 (0.1%)
Lack of court resources	16 (0.0%)
Procurator fiscal staff shortage	3 (0.0%)
Time bar	1,403 (0.4%)
Not a crime	1,685 (0.5%)
No jurisdiction	153 (0.0%)
Age of offence	3,552 (1.1%)
Other specified reason	8,515 (2.6%)
Total cases marked as no proceedings	60,706 (18.5%)²⁶

Source: Crown Office and Procurator Fiscal Service website (www.crownoffice.gov.uk/Publications/2005/10/NoPro)

The aggrieved victim/next-of-kin (or accused, if the decision to prosecute is taken) has no right to appeal the decision of the prosecutor. Indeed, until very recently, victims or the families of deceased victims were not even entitled to receive reasons for decisions not to prosecute, although this changed in February 2005, when an announcement was made by the Lord Advocate (the head of the COPFS) that policy would be modified in order that the

²⁶ The proportion of cases in which a decision not to prosecute was taken is calculated as 18.5% here but in table 1 was shown as 18.8%. This is because the figures on the total number of cases reported in the two tables on the COPFS web site (from where these tables were taken) are not consistent.

COPFS be seen as more open and accountable. As such, the latest edition of the COPFS Annual Review reports that:

Wherever possible, victims and next-of-kin *who request it*, are now provided with an explanation for the decision to take no proceedings, or where proceedings have been commenced, an explanation of the decision to discontinue proceedings, or to accept a plea to a lesser charge.²⁷

If a victim/next-of-kin/the accused is not satisfied with the prosecutor's decision either to prosecute or not to prosecute, he may attempt informally to get the decision reviewed at a higher level in the COPFS but there is no formal right to such a review. Indeed, if the decision has been taken not to prosecute and the accused has been notified of this by the COPFS, this would constitute a renunciation by the Crown of the right to prosecute and would be irrevocable.²⁸ It would not prevent an individual from proceeding with a private prosecution,²⁹ but given the limited nature of the right to private prosecution in Scotland (see below), this is unlikely to succeed.

To date, no decision of a Scottish prosecutor has been subject to judicial review, a procedure whereby any decision of an administrative body can be challenged on the basis that it is wholly unreasonable, procedurally improper or *ultra vires*.³⁰ The approach of the courts to date has been that civil courts have no jurisdiction to review criminal matters.³¹ This is unlike the situation in England and Wales, where prosecution decisions have been successfully judicially reviewed.³² Even if it was established that prosecution decisions were subject to judicial review in Scotland, however, the standard that must be met for a case to be successful is a difficult one to achieve. The decision of the prosecutor would have to be shown to have been so unreasonable that no reasonable prosecutor could have reached it or it would have to be shown that there was some sort of procedural impropriety. Given that the guidelines contained in the Scottish *Prosecution Code* are so vague and generalised, proving procedural impropriety is going to be difficult. In addition, even if this standard is met, the court cannot compel a prosecution (or, if the case is being brought by the accused, prevent a prosecution from taking place). All the court can do is order that the prosecutor revisits the original decision, but this time does so in a procedurally appropriate manner.

There is a *very* limited right of private prosecution in Scotland. It exists only in relation to solemn procedure (which covers the most serious crimes – see section II below), it being abolished in relation to summary procedure in 1995.³³ The private prosecutor must apply to the High Court for permission to bring a prosecution. The court will not normally grant the application unless it is supported by the Lord Advocate, although it is possible in exceptional

²⁷ Crown Office and Procurator Fiscal Annual Review 2004/05, at 6 (emphasis added).

²⁸ *Thom v HM Advocate* 1976 JC 48. See also proposals to allow the prosecutor to issue a statutory notice of immunity from prosecution, in s.88 of the Police, Public Order and Criminal Justice (Scotland) Bill 2005. If a notice of immunity is issued, the decision not to prosecute would also be irrevocable, regardless of how much the victim objects to it.

²⁹ *X v Sweeney* 1982 JC 70.

³⁰ See, for example, *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, *per* Lord Diplock at 407-413.

³¹ *Law Hospital NHS Trust v Lord Advocate* 1996 SC 301; *Myles v Heywood*, 10 September 2001 (unreported). There is a case pending on this issue, but it had not been decided at the time of writing.

³² See, for example, *R v DPP ex p Chaudhary* [1995] 1 Cr App R 136.

³³ Section 133(5) of the Criminal Procedure (Scotland) Act 1995 provides that all prosecutions under summary procedure shall be brought at the instance of the procurator fiscal and the definition of a prosecutor for the purposes of summary proceedings no longer includes a private prosecutor (Criminal Procedure (Scotland) Act 1995 s.307(1)).

circumstances for permission to be granted without his support.³⁴ In addition, the potential private prosecutor must show that he has been personally wronged by the alleged offence.³⁵ Offences such as perjury have been held to be public wrongs, in respect of which a private prosecution is never available.³⁶ Permission to bring a private prosecution has been granted only twice in Scotland in the last 100 years,³⁷ although, at the time of writing, it has been reported that individuals plan to apply for permission to bring a private prosecution in at least two high profile cases in which the procurator fiscal has declined to prosecute.³⁸

I.B. TRIAL STAGE (POST-CHARGE)

Once the decision to prosecute has been taken, the prosecutor can, at any point, decide to desert the case if he feels that there is insufficient evidence to proceed (or indeed for any other reason). Cases can be deserted *pro loco et tempore*, in which case fresh proceedings can be re-raised at a later date, or *simpliciter*, in which case they cannot.³⁹ The decision by the procurator fiscal to desert a case *simpliciter* is one with which the court cannot interfere. The court can, however, refuse to grant a motion by the prosecutor to desert a case *pro loco et tempore* and indeed did so in *Jessop v D*.⁴⁰ The court would be most reluctant to interfere, however, and would do so only if the motion would involve great injustice to the accused.⁴¹

It is also open to the court to *order* that a case be deserted, whether *pro loco et tempore* or *simpliciter*. This power is rarely used and, when it is utilised, it is normally due to the illness of the accused.⁴²

Whether desertion is *pro loco et tempore* or *simpliciter*, the victim has no power to influence this decision and the prosecutor is not required to consult or even inform the victim if a case is to be deserted. As we have already seen, the victim does now have the right to obtain reasons for a decision of this nature, although only “wherever possible”⁴³ and only if he specifically requests this information.

³⁴ *J & P Coats Ltd v Brown* 1909 JC 29; *X v Sweeney* 1982 JC 70.

³⁵ *McBain v Crichton* 1961 JC 25.

³⁶ See *McBain v Crichton* above and also *Trapp v G* 1972 SLT (Notes) 46 and *Trapp v M* 1971 SLT (Notes) 30.

³⁷ In *J & P Coats Ltd v Brown* and *X v Sweeney*.

³⁸ One case involves three children who were allegedly subject to sexual abuse on the Scottish island of Lewis. Despite a lengthy social work report detailing incidents of abuse, no prosecution was brought but the Western Isles Council has indicated that it would support the alleged victims in a private prosecution (“Abused trio may mount private prosecution”, *The Scotsman*, 10 October 2005). The other involves Shirley McKie, an ex-policewoman who was charged with perjury (although subsequently acquitted) when her fingerprint was apparently found at a crime scene. In the event, it was accepted that the print was been mistakenly identified as hers by the Scottish Criminal Records Office (SCRO) and an out of court settlement to pay her £750,000 in damages was agreed. It has been reported that she and her family are considering a private prosecution of the SCRO fingerprint experts who wrongly identified the print as hers (“£50,000 is pledged to Shirley McKie fighting fund”, *The Scotsman*, 25 February 2006).

³⁹ Criminal Procedure (Scotland) Act 1995, ss. 72C(1), 81(1) (as amended by the Criminal Procedure (Amendment) (Scotland) Act 2004).

⁴⁰ 1987 SLT (Sh Ct) 115. Here, the Crown moved to desert a summary complaint where the accused had a heart attack and was temporarily unable to attend trial. They wished to do so on the condition that he stayed away from the complainers in the case, who were young children. The court refused the motion to desert on the basis that this would be unfair to the accused and that the circumstances of this case did not constitute a purpose for which desertion was designed.

⁴¹ *Tudhope v Gough* 1982 SCCR 157.

⁴² *Renton and Brown’s Criminal Procedure According to the Law of Scotland* (6th edn, 1996 by GH Gordon assisted by CHW Gane) (subsequently “*Renton and Brown*”), para 18.21.

⁴³ Crown Office and Procurator Fiscal Annual Review 2004/05, at 6.

In theory, a disgruntled victim in such a situation could attempt to bring a private prosecution. There is some doubt over whether desertion *simpliciter* means that no further proceedings of any nature can be brought against the accused (including private prosecution) or whether this simply bars the Crown from raising a fresh prosecution.⁴⁴ The latter is more likely⁴⁵ but this is of little practical relevance to the disgruntled victim, given that permission is granted for a private prosecution so rarely in Scotland.⁴⁶

The accused may, at this stage (or indeed at any stage up to and including the trial), choose to plead guilty, although the prosecutor has the discretion to refuse to accept any guilty plea tendered by the accused. The procurator fiscal would be most likely to refuse to accept a guilty plea where the accused offers to plead guilty to a lesser offence than the one with which he has been charged (such as culpable homicide where he is charged with murder). However, the prosecutor is not bound to accept a guilty plea to the more minor of two alternative charges.⁴⁷ He is not even bound to accept a guilty plea to a single charge exactly as it is specified on the indictment or complaint.⁴⁸

In *Strathern v Sloan*,⁴⁹ some of the reasons why the prosecutor might refuse to accept a guilty plea, even to the charge exactly as specified, were set out. For example, where there are multiple accused, it might not be possible to assign the proper degree of responsibility to each accused without proceeding to trial against both of them. It may be necessary in relation to serious crime to lead evidence to bring out the full enormity of the crime or to show mitigating circumstances. There may be some concern over whether the proper charge has been brought, for example where murder is charged but there is a possibility that the crime is no more than culpable homicide. There may be a question about the mental state of the accused that can only be explored in evidence.⁵⁰

In the event of a guilty plea being accepted by the procurator fiscal, there is no further examination of the evidence and proceedings move directly to sentencing (see section VII below for more detail on this). If the accused pleads guilty, the same sentencing procedure is followed as it would be if the accused was found guilty following a trial.

II. Organisation of Criminal Procedure (Variations for Lesser Crimes)

Criminal cases in Scotland can be prosecuted under either solemn or summary procedure. Solemn procedure is used for the more serious cases and trials are conducted in front of a jury of 15 members (and presided over by a professional judge, who plays no role in the adjudication of the case). If the case is prosecuted under solemn procedure, it can be brought in either the High Court or the sheriff court.

⁴⁴ See chapter 15 of J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006).

⁴⁵ See Hume, ii, 277.

⁴⁶ Permission for a private prosecution was granted in circumstances akin to these in *X v Sweeney*. Here, in a case in which a brutal rape had allegedly taken place, the complainer was initially unfit to give evidence and the accused were informed by the procurator fiscal that no prosecution would take place. She later recovered and was permitted to bring a private prosecution, as a result of which the accused were convicted.

⁴⁷ *Kirkwood v Coalburn District Co-operative Society* 1930 JC 38.

⁴⁸ *Strathern v Sloan* 1937 JC 76. The indictment or complaint is the document detailing the charge against the accused.

⁴⁹ 1937 JC 76.

⁵⁰ *Strathern v Sloan*, per the Lord Justice-Clerk (Aitchison), at 79.

If the case is prosecuted under summary procedure, the case can be brought in either the sheriff court or the district court, although, at the time of writing, there are plans to replace the district court with a new court called the justice of the peace court.⁵¹ Summary proceedings are reserved for less serious cases and trials are conducted in front of either a single sheriff (a professional judge) if proceedings are taking place in the sheriff court or one or more lay justices if proceedings are taking place in the district court (a practice which will continue if proposals for the new justice of the peace court are implemented).⁵² There is no jury: the sheriff or lay justice is the adjudicator of the case. The lay justice is assisted by a legally qualified clerk, whose role is merely to provide legal advice, rather than to make any adjudication on the outcome of the case.⁵³

This may seem a somewhat over-complex system, but essentially there are four levels at which a case can be prosecuted: the High Court; sheriff court under solemn procedure; sheriff court under summary procedure; and the district court (which will be re-named the justice of the peace court if proposals for change go ahead). There are two main differences of any real significance between them.

First, solemn procedure involves a jury; sheriff summary procedure involves a single professional judge; and district court summary procedure involves (usually) a single lay decision maker. Second, the maximum penalties available at each level of court are different. In the High Court the maximum penalty is life imprisonment; in the sheriff court under solemn procedure it is five years imprisonment;⁵⁴ in the sheriff court operating under summary procedure it is three months imprisonment;⁵⁵ and in the district court it is 60 days imprisonment.⁵⁶ At the time of writing, there are proposals to increase the maximum penalty available under sheriff court summary procedure to 12 months imprisonment⁵⁷ and to give Scottish Ministers the power to increase the maximum penalty in the new justice of the peace court to six months imprisonment, once the new court is established.⁵⁸

⁵¹ Criminal Proceedings Etc. (Reform) (Scotland) Bill 2006, ss. 46-53. Other than minor technical matters, such as the body that is responsible for the administration of the court, there are no plans for its operation to differ significantly from the present district court.

⁵² To make matters more complicated, in one Scottish city (Glasgow), a stipendiary magistrates court operates within the district court: the stipendiary magistrates court is presided over by a single legally qualified stipendiary magistrate. Stipendiary magistrates will continue to operate in Glasgow if the proposed reforms of the court system are implemented.

⁵³ In *Clark v Kelly* [2003] UKPC D1, this was held to be compatible with the European Convention on Human Rights. Here, it was argued that the district court did not constitute an independent and impartial tribunal, as required under Article 6 of the ECHR, on the basis that the clerk lacked the security of tenure necessary to ensure such independence. This argument was dismissed by the Privy Council.

⁵⁴ Recently increased from three years. This change was implemented on 1 May 2004 under s.13 of the Crime and Punishment (Scotland) Act 1997.

⁵⁵ Except where the offender has a previous conviction for personal violence or dishonesty (and the offence for which he is being sentenced is also of this nature), in which case the maximum penalty is six months imprisonment (Criminal Procedure (Scotland) Act 1995 s.5(3)).

⁵⁶ Except in Glasgow Stipendiary Magistrates Court, where the stipendiary magistrates have the same powers as a sheriff under summary procedure (Criminal Procedure (Scotland) Act 1995 s.7(5)). Thus the maximum penalty available to a stipendiary magistrate is, at the time of writing, three months imprisonment.

⁵⁷ Criminal Proceedings Etc. (Reform) (Scotland) Bill 2006, s.33.

⁵⁸ Criminal Proceedings Etc. (Reform) (Scotland) Bill 2006, s.36.

It is also the case, as noted earlier, that private prosecutions can only be brought under solemn procedure, the right to prosecute privately under summary procedure having been abolished in 1995.⁵⁹ Given the limited existence of the right even under solemn procedure, however, this is not a difference of much practical significance.

The choice between solemn or summary procedure and of the court in which prosecution is to take place is almost entirely within the discretion of the prosecutor. One exception to this is that murder, treason, rape, breach of duty by magistrates and deforcement of court messengers must be prosecuted under solemn procedure in the High Court.⁶⁰ There are also certain common law offences that cannot be tried in the district court – these are all relatively serious offences, such as culpable homicide (manslaughter), robbery, fire-raising (arson), certain aggravated assaults, theft by housebreaking (burglary) and uttering forged documents.⁶¹ In addition to this, certain offences that have been created by statute can, under the terms of that statute, only be prosecuted under either summary or solemn procedure. For example, it is the case that many minor road traffic offences can be prosecuted only under summary procedure.⁶²

In terms of the procedure relating to guilty pleas, there is very little difference between the various levels of proceedings. One minor difference is that a fiscal fine can only be offered in relation to alleged offences that would normally be tried before the district court (on which, see section IV below).

III. Informal Mechanisms to Avoid the Full-blown Trial

As has already been noted, the choice of court and type of procedure under which to bring a prosecution is entirely within the discretion of the prosecutor. The accused/victim has no right to object to this decision. Thus the accused cannot elect to have a jury trial in Scotland, as he would be able to in England and Wales, at least in relation to certain offences.⁶³ While an attempt to restrict the right to a jury trial in England and Wales met with uproar,⁶⁴ the discretion of the prosecutor effectively to decide whether or not the accused is tried by a jury (by determining the court in which prosecution takes place) has not been the subject of any significant criticism in Scotland.⁶⁵

Likewise, the judge has no standing to influence the prosecutor's decision on the forum in which proceedings are brought. It is also extremely unlikely that the prosecutor and suspect would engage in bargaining over the decision on court/level of proceedings. Such bargaining as does take place between prosecution and defence is likely to focus on the downgrading

⁵⁹ See section I.A.2 above.

⁶⁰ Criminal Procedure (Scotland) Act 1995 s.3(6).

⁶¹ Criminal Procedure (Scotland) Act 1995 s.7(b)(b).

⁶² See Schedule 2 of the Road Traffic Act 1988.

⁶³ A state of affairs that would seem almost unthinkable to some of our colleagues over the border in England and Wales where, in relation to so-called 'either way offences', the defendant has the right to elect to be tried by a jury.

⁶⁴ A recent review of the English criminal justice system recommended the removal of this right (Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001), at para 10) but, following considerable opposition, the government decided to retain it (Home Office White Paper, *Justice for All* (2002), at para 4.22). See A Ashworth and M Redmayne, *The Criminal Process* (3rd edn, 2005), at 301-302.

⁶⁵ See P Duff, "The defendant's right to a jury trial: a neighbour's view" [2000] *Criminal Law Review* 85-94.

and/or dropping of charges and is likely to occur, if at all, after the decision to prosecute has been taken and proceedings commenced.

IV. Pre-trial Consensual Procedures

As noted earlier, the prosecutor has various options open to him if he decides not to prosecute. The two that are relevant here are the fiscal fine and the fixed penalty.

Fiscal fines

The fiscal fine⁶⁶ was introduced in Scotland in 1988.⁶⁷ This was following the recommendation of the Stewart Committee,⁶⁸ which was set up by the government in 1977 with the remit of considering how best to reduce the pressure on the criminal courts and the procurator fiscal that was resulting from an increase in the volume of summary prosecutions. The relevant legislation is now s.302 of the Criminal Procedure (Scotland) Act 1995. Under s.302, the procurator fiscal has the discretion to offer a fiscal fine in relation to any offence “in respect of which an alleged offender could be competently tried before a district court”.⁶⁹ Initially there was only a single level of fiscal fine available (£25), but since 1 April 1996,⁷⁰ there have been four levels of fiscal fine: £25, £50, £75 and £100. If the accused accepts (and subsequently pays) a fiscal fine, no prosecution is brought and no criminal conviction is recorded. At present, the fact that a fiscal fine has previously been paid is not made known to the court if the accused is prosecuted for subsequent offences (but see below for proposals to change this).

Other than the requirement that the offence be one in respect of which the alleged offender could competently be tried in the district court,⁷¹ there are no limits on the type of offences for which this procedure is available. However, the procurator fiscal must act in the public interest and thus it is unlikely it would ever be used in relation to serious offences. In 2004/05, fiscal fines were issued in approximately 7% of cases reported to the procurator fiscal.⁷²

In 2004, the McInnes Committee,⁷³ which was set up to review the operation of summary justice in Scotland, recommended a number of changes be made to the system of fiscal fines. First, it was recommended that the maximum level of fiscal fine be increased to either £200 or £500, to bring it in line with court imposed financial penalties.⁷⁴ The Scottish Executive

⁶⁶ In legislation, this is generally referred to as a “fixed penalty” or a “conditional offer by the procurator fiscal” (see s.302 of the Criminal Procedure (Scotland) Act 1995). It has, however, come to be commonly known as a fiscal fine and this is the term that will be used here to avoid confusion with the fixed penalties that can be offered by the prosecutor and the police for road traffic offences (discussed below).

⁶⁷ By s.56 of the Criminal Justice Act (Scotland) 1987, which came into force on 1 January 1988.

⁶⁸ *Keeping Offenders Out of Court: Further Alternatives to Prosecution* (Cmnd 8958, 1983).

⁶⁹ Except offences that fall under the auspices of the fixed penalty scheme, on which see below.

⁷⁰ The date on which s.302 of the Criminal Procedure (Scotland) Act 1995 came into force.

⁷¹ This rules out offences including murder, rape, culpable homicide (manslaughter), robbery, fire-raising (arson), certain serious assaults and theft by housebreaking (burglary).

⁷² See table 1 above.

⁷³ The Summary Justice Review Committee, known as the McInnes Committee after its chairman, Sheriff Principal John McInnes.

⁷⁴ Summary Justice Review Committee, *Report to Ministers* (2004) (subsequently the “McInnes Report”), para 11.42.

accepted this recommendation and the resulting Criminal Proceedings Etc. (Reform) (Scotland) Bill 2006 proposes a new limit of £500.⁷⁵

Secondly, the McInnes Committee recommended that the acceptance of a fiscal fine should be information that is disclosed to the court if the accused is subsequently convicted of another offence, although it was recommended that this should be limited to subsequent proceedings commencing within a specified period of between two to five years.⁷⁶ This too was accepted by the Scottish Executive and the resulting Bill permits disclosure in relation to any subsequent offences committed within two years of the day of acceptance of the fiscal fine.⁷⁷

Thirdly, and most controversially, the McInnes Committee recommended that fiscal fines should operate under an opt-out system.⁷⁸ That is, if the accused is sent notice of the offer of a fiscal fine, he will be deemed to have accepted that offer if he takes no positive action to refuse it within a certain specified period of time. Once he is deemed to have accepted the fiscal fine by his inaction, failure to pay would lead to the accused becoming subject to the normal procedures for the enforcement of criminal fines. At present, the accused who ignores a fiscal fine notice will simply become subject to prosecution for the criminal offence in question. The McInnes proposals were accepted by the Scottish Executive and are presently contained in s.39(1)(a)(iii) of the Criminal Proceedings Etc. (Reform) (Scotland) Bill 2006, which provides that an offer of a fiscal fine is deemed to have been accepted unless notice to the contrary is sent to the clerk of court within 28 days of the offer being made. At the time of writing, criticism of the opt-out scheme had been made at the Committee stage of the Bill and this may result in this proposal being abandoned.

The McInnes Committee also recommended that the procurator fiscal should be empowered to offer the accused the option of paying a compensation order, in the same way as he presently has the power to offer a fiscal fine as an alternative to prosecution.⁷⁹ The only difference between the two would be that, if the offer is accepted by the accused, the money would be received not by the state but by the victim. Like the fiscal fine, the offer of a compensation order would be deemed to have been accepted if no notice to the contrary is given. This proposal was accepted by the Scottish Executive and the resulting Bill establishes the fiscal compensation order in the terms recommended by the McInnes Committee, subject to a maximum limit of £5000.⁸⁰

One further reform is planned, one that was not even considered by the McInnes Committee. The Scottish Executive plans to introduce “work orders”.⁸¹ These are effectively community service orders offered by the procurator fiscal that would operate in a similar fashion to the fiscal fine and fiscal compensation order. Work orders are introduced in s.40 of the Criminal Proceedings Etc. (Reform) (Scotland) Bill 2006 and, if the Bill is passed, will be piloted in a limited number of areas before a decision is taken on whether or not to roll them out across Scotland. Under s.40, the procurator fiscal will be able to offer the accused the option of undertaking a specified number of hours of unpaid work in relation to any offence that can be tried under summary procedure. If the offer is accepted, this will not count as a conviction,

⁷⁵ Section 39(1)(e) of the Bill.

⁷⁶ McInnes Report, para 11.17.

⁷⁷ Section 39(1)(a)(v) of the Bill.

⁷⁸ McInnes Report, para 11.34.

⁷⁹ McInnes Report, para 11.57.

⁸⁰ Section 39(2) of the Bill, which adds a new s.302A(13) to the Criminal Procedure (Scotland) Act 1995.

⁸¹ Also termed the “fine on time” or the “community fiscal fine” by the Scottish Executive (see the White Paper *Supporting Safer, Stronger Communities: Scotland’s Criminal Justice Plan* (2004), at para 3.16).

but could be disclosed in the event of conviction for a subsequent offence within two years of completion of the work order. Unlike fiscal fines and fiscal community service orders, the accused would have to take positive action to accept the offer of a work order, rather than being deemed to have accepted it after 28 days has passed with no notice of rejection.

Fixed penalties

The procurator fiscal is also empowered to make an offer of a fixed penalty as an alternative to prosecution for various road traffic offences, such as speeding, driving whilst using a mobile telephone and failure to comply with road traffic directions and signs.⁸² The levels of fixed penalty vary according to the alleged offence in question. For non-endorseable offences,⁸³ the level of fixed penalty is presently £30; for endorseable offences, it is £60. In 2003, a number of additional offences were added to those for which a fixed penalty could be offered, most notably driving without insurance,⁸⁴ for which the penalty is £200, and failure to supply the details necessary to identify the driver of a vehicle, for which the penalty is £100.⁸⁵ The accused has 28 days in which to accept the fixed penalty, after which time the case reverts to the procurator fiscal for prosecution.⁸⁶ Unlike the fiscal fine, if a fixed penalty is accepted, it is recorded as a criminal conviction against the accused. In 2004/05, fixed penalties were issued in approximately 3% of cases reported to the procurator fiscal.⁸⁷ This figure used to be higher but has gone down since it became possible for the police to issue fixed penalties (see below).

In addition to the fiscal fine and the fixed penalties that can be issued by the procurator fiscal, it has been possible since 1993 for fixed penalties for road traffic offences to be issued by the police and indeed it is now far more common for fixed penalties to be issued by the police than it is for them to be issued by the procurator fiscal.

This is apparent from the most recently available set of figures on fixed penalties for road traffic offences in Scotland.⁸⁸ The number of fixed penalty offers issued by the police in 2004/05 was 280,900,⁸⁹ an increase of 22 per cent on 2003/04. Sixty-nine per cent of these offers related to speeding offences. By contrast, 9,847 reports to the procurator fiscal in 2004/05 resulted in the acceptance of a fixed penalty for road traffic offences.⁹⁰

The McInnes Committee recommended the extension of fixed penalties to a wider range of offences, especially to statutory offences of a regulatory nature.⁹¹ This was not addressed specifically in the proposed legislation resulting from the McInnes Report but to an extent has happened anyway. The use of fixed penalties, while initially restricted to road traffic offences, has recently been extended to anti-social behaviour. Under the Antisocial Behaviour Etc. (Scotland) Act 2004, a police officer is now entitled to offer a fixed penalty for various offences (listed in s.128 of the Act), including being drunk and incapable in a public place,

⁸² Road Traffic Offenders Act 1988 s.75(2).

⁸³ Those which are not recorded against the driving licence of the offender.

⁸⁴ Road Traffic Act 1988 s.143.

⁸⁵ Road Traffic Act 1988 s.172.

⁸⁶ Assuming the offence has not been decriminalised, as, for example, some parking offences have been.

⁸⁷ See table 1 above.

⁸⁸ Scottish Executive, *Criminal Proceedings in Scottish Courts 2004/05* (2006).

⁸⁹ A figure almost as high as the total number of alleged offences reported to the procurator fiscal in 2004/05, which was 323,016 (see table 1 above).

⁹⁰ See table 1 above.

⁹¹ McInnes Report, para 9.19.

persisting in making excessive noise after being asked to stop, urinating in circumstances causing annoyance to others, vandalism, and breach of the peace.

The position of the victim and the court

In relation to the offer of either a fiscal fine or a fixed penalty, there is no formal procedure by which the victim or next-of-kin can influence the decision, although, as we have already seen, the *Prosecution Code* states that the “attitude of the victim” is one of the factors that the prosecutor should take into account in deciding whether prosecution (or the use of one of the alternatives to prosecution) is in the public interest. Likewise, the court has no influence over this decision and indeed no involvement in it, assuming that the offer of a fiscal fine or fixed penalty is accepted by the accused. There would not normally be any bargaining between prosecution and defence at this stage.

V. Diversion to Social Worker, Psychiatrist or Psychologist

As we have already seen, one of the options available to the prosecutor is to divert the accused to the supervision of a social worker, psychiatrist or psychologist. If the alleged offence has been committed by a child, the prosecutor may likewise divert the case to the Scottish Children’s Reporter. This is an alternative to prosecution and, if a case is diverted, it does not count as a criminal conviction for the accused. In 2004/05, diversion was used in 3.5% of cases reported to the procurator fiscal (this figure includes cases that were diverted to mediation schemes, on which see section VI below).

Diversion from prosecution was formally introduced as an option in 1988 following the recommendation of the Stewart Committee⁹² although it was recognised by the Stewart Committee that diversion had occasionally been happening informally anyway (it would have been recorded as a ‘no prosecution’ decision or as a warning letter).

In theory, there are no limits on the type of alleged offences for which this procedure is available. However, the prosecutor must act in the public interest and thus it is *unlikely* (although not impossible) that it would ever be used in relation to very serious offences. As the *Prosecution Code* states, diversion is generally appropriate “for less serious offences where it may prevent or deter future offences”.⁹³ There would not normally be any bargaining between prosecution and defence at this stage.

VI. Diversion to Victim-Offender Reconciliation

In addition to the option to divert the accused to receive the attention of a social worker, psychologist or psychiatrist, the prosecutor also has the option to divert the accused to a recognised victim-offender mediation scheme. This is an alternative to prosecution and, in the event that mediation is successful, does not count as a criminal conviction for the accused. Like diversion for psychiatric or social work attention, diversion from prosecution to mediation was formally introduced as an option in 1988 following the recommendation of the Stewart Committee.⁹⁴

⁹² *Keeping Offenders Out of Court: Further Alternatives to Prosecution* (Cmnd 8958, 1983).

⁹³ At 10.

⁹⁴ *Keeping Offenders Out of Court: Further Alternatives to Prosecution* (Cmnd 8958, 1983).

In Scotland, mediation and reparation schemes are run by SACRO,⁹⁵ a charitable organisation set up with the aim of reducing offending and making communities safer. At the time of writing, they are only available in certain regions: Aberdeen, Edinburgh and North and South Lanarkshire. Although the procurator fiscal can recommend that a case be diverted to a mediation scheme, participation is entirely voluntary and requires the consent of the victim and the accused. In 2004/05, mediation was undertaken with 1,232 victims of crime and 1,068 accused.⁹⁶ Agreement was reached in 91% of referrals in which both parties participated and of these, 90% of the agreements were completed satisfactorily.⁹⁷

There is, to my knowledge, no history of abuse of mediation schemes by powerful accused or victims.

VII. Guilty Plea and Inducements

The accused who has been charged with a criminal offence can, at any point in the prosecution process, decide to plead guilty. A guilty plea can be tendered to any charge, regardless of how serious it is. Thus the accused can plead guilty to murder, just as he can to a minor traffic offence. Scottish criminal procedure operates a system of preliminary hearings prior to the trial.⁹⁸ Thus the accused could choose to plead guilty at a preliminary hearing or at the trial itself. It is also possible for the accused to plead guilty prior to the first preliminary hearing scheduled for the case, at an early hearing specially arranged under s.76 of the Criminal Procedure (Scotland) Act 1995. The accused may choose to plead guilty as charged or his guilty plea may be accompanied by an adjustment to the charges on the part of the prosecutor (on which, see below). When a guilty plea is tendered, the court moves straight on to the sentencing process. Although the guilty plea will be recorded by the court, the court does not enquire into the fact or circumstances of the guilty plea. As we have already seen, the decision on whether or not to accept a guilty plea is entirely within the discretion of the prosecutor, although an offer to plead guilty may occasionally be rejected (see section I.B above).

There are two ways in which the Scottish criminal justice system offers an inducement to the accused in order to try and persuade him to plead guilty. The first is sentence discounting for guilty pleas. It is set out in legislation that the fact and timing of a guilty plea shall be taken into account in passing sentence. Section 196 of the Criminal Procedure (Scotland) Act 1995 provides that:

In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account: (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and (b) the circumstances in which that indication was given.

Where the accused pleads guilty and a reduced sentence is not passed, the sentencer is required to give reasons in open court as to why a sentence discount has not been applied. Section 196 does not set out the level of sentence discount that should normally be applied for an early guilty plea, but this has now been addressed in case law. In *Du Plooy v HM*

⁹⁵ The acronym stands for Safeguarding Communities, Reducing Offending.

⁹⁶ SACRO Annual Report 2004/05, at 10.

⁹⁷ SACRO Annual Report 2004/05, at 10.

⁹⁸ Termed preliminary hearings in High Court solemn procedure, first diets in sheriff court solemn procedure and intermediate diets in summary procedure.

Advocate,⁹⁹ the High Court recommended that the accused who pleads guilty at the earliest possible stage in the criminal justice process should normally receive a discount of around one third of the sentence he would otherwise have received.

Sentence discounting, as permitted under s.196, sits alongside a system of informal charge and/or fact bargaining, which can also result in the accused receiving a lesser sentence if he pleads guilty. Charge bargaining refers to the practice whereby the prosecutor accepts a plea of guilty in exchange for the reduction or deletion of a charge on the indictment or complaint. For example, the accused who is charged with murder may offer to plead guilty to culpable homicide or the accused who is charged with rape may offer to plead guilty to indecent assault. Fact bargaining refers to the deletion or amendment of the narrative contained in the charge. For example, the original charge might allege that the accused “assaulted the complainer by kicking, punching and biting her” and he might offer to plead guilty if the words “punching and biting” are deleted. In both instances, the hope of the accused is that the changes to the charges will be reflected in a lesser sentence.

The process of charge and fact bargaining is entirely dependent on informal negotiations between the prosecution and the defence. There is no involvement on the part of the judge. Scotland does not operate a system of American-style sentence bargaining. This means that the prosecution cannot guarantee to the accused that a particular sentence will result if he pleads guilty (unless the bargain means that the court’s sentencing powers are reduced because, for example, the offence to which the accused eventually pleads guilty has a maximum sentence).¹⁰⁰

The pronouncement of the High Court in *Du Plooy* would, however, seem to indicate that judges *are* bound to impose a sentence discount of one third on the accused who pleads guilty at the earliest opportunity, although there is anecdotal evidence to suggest that some judges may simply start their calculations of sentence from a higher initial tariff in order to avoid giving the full sentence discount.¹⁰¹ In relation to charge/fact bargaining, and given the extent of sentencing discretion possessed by Scottish judges, there is no real way of telling whether or not the accused actually received a lesser sentence as a result of pleading guilty (unless, as already noted, the charge to which the accused eventually pleads guilty has a maximum sentence lower than that of the one with which he was originally charged).¹⁰²

It was noted earlier that the prosecutor can refuse to accept a guilty plea. The court has no direct power to do so, although if it transpires that a plea in mitigation¹⁰³ is incompatible with the guilty plea, the judge might intervene and ask the prosecutor to re-consider whether the guilty plea should have been accepted in the first place.¹⁰⁴

⁹⁹ 2005 1 JC 1 (although reported in 2005, the case was decided in October 2003).

¹⁰⁰ For an account of the system of fact and charge bargaining in the Scottish criminal justice system, see chapter 6 of S Moody and J Tombs, *Prosecution in the Public Interest* (1982) and C Jones, “Contested summary trials in the sheriff court”, in M Adler and A Millar, *Socio-Legal Research in the Scottish Courts* (1988, eds) 50-59.

¹⁰¹ Interviews undertaken by the authors in 2005 and 2006 with participants in the criminal justice process (for a project evaluating recent reforms of High Court procedure).

¹⁰² Maximum sentences exist only in relation to certain statutory offences (although sentencers are bound by the sentencing powers of the court in which prosecution takes place – on which, see section II above). The majority of Scottish criminal law (other than driving and drugs offences) is found in the common law and has no maximum sentence.

¹⁰³ A plea in mitigation is a speech made by the accused (or more commonly his legal representative) at the sentencing stage presenting the arguments for a lenient sentence.

¹⁰⁴ The authors have observed this occurring in court.

The victim has no direct influence over the prosecutor's decision on whether or not to accept a guilty plea or a fact or charge bargain. Indeed, in *Fox v HM Advocate*,¹⁰⁵ the High Court expressed their disapproval of any practice that includes victims or their next-of-kin in discussions over whether a charge bargain should be accepted. The victim or next-of-kin of the victim can at least ask the procurator fiscal for an explanation of why a plea to a lesser charge was accepted. As noted earlier, the COPFS has recently made a commitment to explain decisions of this nature to any victim or next-of-kin who requests an explanation.¹⁰⁶

If the accused pleads guilty, once this has been recorded as a conviction, he cannot withdraw his guilty plea.¹⁰⁷ However, it is possible for the accused to appeal against his conviction, even where this conviction was recorded as a result of a guilty plea tendered by himself, on the basis that the guilty plea was tendered in error.¹⁰⁸

Table 3 below shows the proportion of cases that are settled by a guilty plea compared to the proportion that are settled following a trial. The figures exclude cases that were deserted by the procurator fiscal or the court. As table 3 shows, the vast majority of criminal cases in Scotland are settled by a guilty plea.¹⁰⁹ The proportion of guilty pleas is highest at the lowest levels of court (97% of district court cases concluded with a guilty plea in 2004/05) but even at the most serious level of business, the High Court, which deals primarily with murder, rape, serious assaults and serious drugs offences, the guilty plea rate in 2004/05 was 63%.

Table 3: Proportion of cases settled by guilty pleas 2004/05

District Court	
Cases concluded by a plea	40,071 (97%)
Cases concluded at trial	1221 (3%)
Sheriff court summary¹¹⁰	
Cases concluded by a plea	77,385 (93%)
Cases concluded at trial	5,930 (7%)
Sheriff court solemn	
Cases concluded by a plea	2,920 (81%)
Cases concluded at trial	691 (19%)
High Court	
Cases concluded by a plea	535 (63%)
Cases concluded at trial	317 (37%)

Source: Crown Office and Procurator Fiscal Website (www.crownoffice.gov.uk/About/corporate-info/Caseproclast5)

¹⁰⁵ 2002 SCCR 647.

¹⁰⁶ Crown Office and Procurator Fiscal Annual Review 2004/05, at 6.

¹⁰⁷ Renton and Brown, para 18-32.

¹⁰⁸ *Evans, Petitioner* 1991 SCCR 160; *Crossan v HM Advocate* 1996 SCCR 279.

¹⁰⁹ It is not entirely clear whether the figures for the number of cases settled by a plea refer only to guilty pleas or whether they also include cases which concluded when a 'not guilty' plea was accepted by the procurator fiscal. Where a not guilty plea is accepted by the procurator fiscal, this is equivalent to the case being deserted. It would, however, make little difference to the overall pattern in table 3 if cases where a not guilty plea was accepted were included as this happens only relatively rarely.

¹¹⁰ Including cases dealt with in the Stipendiary Magistrates Court in Glasgow.

The offering of incentives to plead guilty is a relatively recent development. Historically, there was something of an antipathy towards the practice of sentence discounting in Scotland. Between the mid 1980s and mid 1990s, sentence discounting was not formally operated after the High Court disapproved of the practice in *Strawhorn v McLeod*.¹¹¹ This can be contrasted to the position in England and Wales where, during the same period, sentence discounting was regarded as relatively unproblematic, with courts commonly applying sentence discounts of up to one third in exchange for guilty pleas.¹¹²

The attitude towards sentence discounting in Scotland started to change in 1995, when permissive legislation on sentence discounting came into force.¹¹³ For the first time, it was recognised in statute that a sentencer *may* take into account the fact and timing of a guilty plea when passing sentence for a particular offence.¹¹⁴ This provision was strengthened following Lord Bonyon's *Review of the Practices and Procedures of the High Court of Justiciary*.¹¹⁵ Whereas the legislation initially provided only that the fact and timing of a guilty plea *may* be taken into account in sentencing, s.196 now provides that sentencers are *required* to take this into account in arriving at an appropriate sentence, and must give reasons in open court if a discount is not applied.¹¹⁶

Some disquiet has been expressed in the academic literature over these developments and this is dealt with in section VIII below.

VIII. Historical Perspective and Comment

Consensual settlement in Scottish history

In the 16th century one would have found a state of affairs whereby the majority of prosecutions were brought not by the Crown, but at the instance of the person injured by the alleged offence or his relatives. The system has been described as one in which “[t]he powerful criminal escaped justice; the wealthy purchased immunity from punishment; and the poor and weak suffered wrongs without daring to bring the perpetrator to justice”.¹¹⁷ There is evidence that a system of consensual settlement did operate at this time, with private arrangements between injured parties and offenders being common.¹¹⁸

The right of the Crown to bring a prosecution, regardless of whether the victim chose to do so, was one that developed towards the end of the 16th century, most notably in an Act of Parliament of 1587.¹¹⁹ Gradually, from this point onwards, the Lord Advocate started to assume almost complete control over the prosecution process to the point that, by the late

¹¹¹ 1987 SCCR 413.

¹¹² See F Leverick, “Tensions and balances, costs and rewards: the sentence discount in Scotland” (2004) 8 *Edinburgh Law Review* 360-388, at 361.

¹¹³ Initially in s.33 of the Criminal Justice (Scotland) Act 1995 and now in s.196 of the Criminal Procedure (Scotland) Act 1995.

¹¹⁴ Criminal Procedure (Scotland) Act 1995 s.196.

¹¹⁵ Lord Bonyon, *The 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2002).

¹¹⁶ Criminal Procedure (Scotland) Act s.196, as amended by s.20 of the Criminal Procedure (Amendment) (Scotland) Act 2004.

¹¹⁷ WG Normand, “The public prosecutor in Scotland” (1938) 54 *Law Quarterly Review* 345-357, at 345.

¹¹⁸ Normand, “The public prosecutor in Scotland”, at 345.

¹¹⁹ Cap. 77.

1700s, the victim who wanted to bring a private prosecution had to obtain the consent of the Lord Advocate in order to do so.¹²⁰

The effectiveness and reception of consensual procedures

There has been some disquiet over the offering of incentives to try and persuade accused persons to plead guilty. There are three possible justifications for offering incentives to plead guilty: that guilty pleas save the criminal justice system time and money; that guilty pleas spare the victim from the distress of having to give evidence at trial; and that a guilty plea is evidence of remorse on the part of the offender. It has been suggested that the only convincing justification is the first: the efficiency justification.¹²¹

On this, there is little doubt that guilty pleas save the Scottish criminal justice system an enormous amount of time and money. In terms of time, in the Scottish adversarial system, it is still the case that, by and large, every crucial fact has to be proved beyond reasonable doubt by oral testimony in court and the defence has the right to cross-examine Crown witnesses (and *vice versa*).¹²² We have already seen that the proportion of cases settled by a guilty plea ranges from 63% to 97%, depending on the level of court in which the case is prosecuted. If all of these cases had instead to be taken to trial, without a huge injection of additional resources the system simply could not cope and the resulting delays would be enormous.

In terms of cost, table 4 below shows the court costs of a case according to the stage at which it is concluded. It is immediately obvious that a guilty plea, especially at an early stage in proceedings, saves the Scottish criminal justice system (and thus taxpayers) a lot of money. A similar impact can be seen on prosecution costs.¹²³

Table 4: Court costs of case by stage of conclusion in 2003/04

Type of case ¹²⁴	Stage of case conclusion	Average cost per case
High Court	Plea at s.76 hearing ¹²⁵	£324
	Plea at preliminary hearing	£324
	Plea at trial diet	£324
	Case concluded at trial	£13,879
Sheriff solemn	Plea at first diet	£117
	Plea at trial diet	£195
	Case concluded at trial	£6,368
Sheriff summary	Plea at pleading diet	£78
	Plea at intermediate diet	£156
	Plea at trial diet	£234
	Case concluded at trial	£1,463

Source: Scottish Executive, *Costs, Sentencing Profiles and the Scottish Criminal Justice System* (2005), at 7.

¹²⁰ Normand, “The public prosecutor in Scotland”, at 345.

¹²¹ Leverick, “Tensions and balances”, at 380.

¹²² There are some exceptions, the most notable being an increased emphasis on the agreement of uncontroversial evidence prior to trial (there is now a duty on the prosecution and defence to do this – see s.257 of the Criminal Procedure (Scotland) Act 1995).

¹²³ Scottish Executive, *Costs, Sentencing Profiles and the Scottish Criminal Justice System* (2005), at 8.

¹²⁴ No figures are available for the costs of district court cases.

¹²⁵ A hearing under s.76 of the Criminal Procedure (Scotland) Act 1995. This is the earliest opportunity for an accused to plead guilty. It is arranged specifically for this purpose and takes place before any preliminary hearing.

Balanced against the efficiency savings that guilty pleas bring are two principled objections that can be made to sentence discounting, namely that it encourages the innocent to plead guilty and that it unfairly penalises those who exercise their right to go to trial.¹²⁶

The encouragement of guilty pleas through a formal process of sentence discounting can be seen as increasing evidence of managerialism in the Scottish criminal justice system (on which see below) at the possible expense of due process. Academic opinion is divided on whether the balance that has been struck to date is an acceptable one.

There is little evidence from the reported case law of concerns over the practice of sentence discounting being *formally* expressed by the courts. Indeed, in *Du Plooy*, it was accepted by the High Court that the efficiency gains resulting from guilty pleas were a legitimate justification of the practice of sentence discounting. The court in *Du Plooy* stated that it is appropriate to reward the tendering of a plea of guilty because it “is likely to save public money and court time”.¹²⁷ The court also expressed its approval of a passage in the Australian High Court case of *Cameron v The Queen*,¹²⁸ where Kirby J stated that:

It is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delay the hearing of such trials as must be held. It also encourages the clear-up-rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws.¹²⁹

Subsequent cases have continued to stress the efficiency justification of the sentence discount. For example, in *Smith v HM Advocate*,¹³⁰ the appellant and a co-accused had both pled guilty and received identical sentences (a fine of £150), but whereas the appellant had done so at the first available opportunity (the pleading diet), his co-accused had done so at the intermediate diet, two months later. It was argued that this fact should have been reflected in the sentence he received. The Appeal Court agreed, and substituted a fine of £100, stating that:

... one of the primary reasons for the discount is to reflect the utilitarian value of the plea. The earlier the plea is intimated, the greater its utilitarian value ... if the policy of encouraging guilty pleas is to be effective, solicitors must be able to give plausible advice to their clients that the earlier a plea of guilty is tendered, the more substantial the discount is likely to be.¹³¹

In *HM Advocate v Alexander*,¹³² the accused pled guilty to two murders and the punishment part of his sentence was set at 17 years.¹³³ The punishment part would have been set at 24 years if it were not for the early guilty plea; thus a discount of seven years was granted. The sentence was appealed by the Crown on the basis that it was unduly lenient. The accused had indicated to the Crown via his solicitor that he was prepared to plead guilty at the earliest possible opportunity, but the *actual* tendering of the plea was delayed while a psychiatric assessment was carried out. During this delay, the Crown began to prepare the case for trial.

¹²⁶ Leverick, “Tensions and balances”, above.

¹²⁷ At [16].

¹²⁸ (2002) 209 CLR 339.

¹²⁹ At [67] of *Cameron* and [11] of *Du Plooy*. Kirby J’s judgement was actually a dissenting judgement, a fact that was not acknowledged by the court in *Du Plooy*.

¹³⁰ 2005 SCCR 704.

¹³¹ At [6].

¹³² High Court, 9 June 2005, unreported.

¹³³ The sentence for murder in Scotland is always life imprisonment, but a minimum term is specified called the ‘punishment part’. If the offender does not pose any further threat to society, he can be released after serving the punishment part of a life sentence.

The Appeal Court accepted that the guilty plea was tendered at the earliest possible opportunity and that it would have been wrong for the plea to be tendered prior to the accused's mental state being established by a psychiatrist. Nonetheless, it was held that the effect of the delay was that preparations for trial were undertaken and, as a result, "there was, in fact, very little utilitarian value in the pleas".¹³⁴ A punishment part of 20 years was substituted, the discount being set at four years.

In *HM Advocate v Roulston*,¹³⁵ the sentencing judge had originally allowed a discount of 25% for a guilty plea tendered at trial. The resulting sentence of three years was held to be unduly lenient by the Appeal Court, who substituted a sentence of seven years. The discount of 25% was too great, it was stated, because the plea was not made at the earliest opportunity and thus did not result in the maximum utility benefits. Instead a discount of one eighth was given (the sentence would otherwise have been eight years).

In *Roberts v HM Advocate*,¹³⁶ the accused was sentenced to 13 years imprisonment after being found guilty of culpable homicide at trial. The accused had originally been charged with murder and had, at an early stage in proceedings, offered to plead guilty to culpable homicide. This offer was rejected by the Crown, who proceeded with the murder charge. The accused appealed against his sentence on the basis that he had been denied a sentence discount for his early offer to plead guilty to the charge of which he was eventually convicted. His argument was rejected by the Appeal Court, who stated that "[t]he utilitarian value following on a plea of guilty ... plainly would not exist in a context in which the plea had not been accepted".¹³⁷

Informally, however, some judges have expressed discomfort with the system. For example, at least two High Court judges interviewed by the authors in connection with a project evaluating the impact of recent reform in High Court procedure have questioned the appropriateness of the practice of sentence discounting.¹³⁸ It was pointed out by both that the extent of the reduction in sentence as a result of the interaction between formal sentence discounting and fact and charge bargaining can be enormous. Not only does the accused gain the benefit of the one third discount for an early guilty plea, but he may in addition have pled guilty to a reduced charge, as part of a charge bargain, so the starting point for sentencing will also be lower.

¹³⁴ At [13].

¹³⁵ 2006 JC 17.

¹³⁶ 2005 SCCR 717.

¹³⁷ At [10]. See also *Weir v HM Advocate* 2006 SLT 353, where the Appeal Court referred to: "the utilitarian value of the guilty plea (at [11] and [12]) and *Mackie v Stott* 2004 SLT 1319, where it was said that: "the utilitarian value of the plea may be reduced or negated by the fact that ... a further diet has been made necessary" (at [9]). Although *cf. McGaffney v HM Advocate* 2004 SCCR 384. Here, the accused pled guilty at the earliest possible opportunity, but the maximum discount of one third was not applied because he had not spared any vulnerable witnesses from the ordeal of giving evidence at trial (the offence in question related to the downloading of pornographic images of young children from the internet and would have been proved by expert witnesses).

¹³⁸ Interviews undertaken in 2005 and 2006.

To take a hypothetical example: the accused is charged initially with rape, which might attract a sentence of around eight years imprisonment. He then pleads guilty to indecent assault, which might lower the starting point for sentencing to around four years. If he pled guilty at the earliest possible opportunity, he might then receive a further third off his sentence. This would result in an eventual sentence of just over two years, compared to the eight year starting point.

In addition to this, the fact that the case did not go to trial means that the full details of the offence (including, as one judge put it, “the gory details”) may not come to the attention of the sentencing judge, meaning that any particularly aggravating features of the offence that might have resulted in an increased sentence could go unheard. Where an offender pleads guilty, at least in the High Court, the prosecution and defence now agree a narrative of the offence that is presented to the judge at the sentencing stage before the defence’s plea in mitigation.¹³⁹

There has also been some disquiet over the use of the various alternatives to prosecution, especially the fiscal fine and the fixed penalty. This has long been seen by some as evidence of an “essentially bureaucratic-administrative law enforcement system”¹⁴⁰ as opposed to one concerned with due process. It has been suggested that fiscal fines in particular, given that they can be offered for offences such as minor physical assaults, theft and vandalism, reduce the moral status of such behaviour to the level of a regulatory offence.¹⁴¹ In this way, the fiscal fine can be viewed as merely a tax on such activity, rather than a punishment that expresses moral condemnation. These concerns become more pressing given that the increased use of fiscal fines is being encouraged by the Scottish Executive¹⁴² and that there is a proposal to increase the maximum level of the fine to £500 (see section IV above), thus bringing a wider range of alleged offences within its scope.

Prospects for future reform

We have already seen that the trend in Scotland is towards an increasingly managerialist criminal justice system. This is evidenced by two related developments: the use of incentives to encourage the accused to plead guilty and the removal of relatively minor cases from the court system entirely.

In relation to the first, we have already seen that sentence discounting for early guilty pleas is actively encouraged and that that the justification for this is now openly stated by the Scottish Executive and the courts to be the resulting efficiency benefits.

¹³⁹ A practice the authors have become aware of as a result of our evaluation of the recent reforms of High Court procedure.

¹⁴⁰ A Bottoms, “Neglected features of contemporary penal systems”, in D Garland and P Young, *The Power to Punish* (1986, eds) 166-202, at 185.

¹⁴¹ P Duff, “The prosecutor fine” (1994) 14 *Oxford Journal of Legal Studies* 565-587, at 583-585.

¹⁴² See, for example, chapter three of the White Paper *Smarter Justice Safer Communities* (2005).

In relation to the second, the most recent review of the criminal justice system, undertaken by the McInnes Committee, recommended that:

alternatives to prosecution be made more widely available, more flexible and more robust, to enable the courts to focus on more rapid handling of serious crimes and offences while giving police and procurators fiscal the range of powers they need to respond quickly and appropriately to minor offences.¹⁴³

This was echoed in the Scottish Executive policy memorandum that accompanied the resulting proposed legislation, where it was stated that:

A court intervention, which is a resource intensive and often lengthy process, should only be used in cases where the severity of the offence clearly requires it, the accusation is genuinely in dispute or where there are circumstances relating to the offender (such as their previous record) that make a court disposal appropriate. In cases of minor offending a quick rigorously enforced and proportionate non-court penalty is likely to be more effective in deterring re-offending. Such a penalty can also be administered more efficiently ensuring those cases requiring a court hearing can themselves reach court with the minimum of delay.¹⁴⁴

Thus, it would seem that the courts (with their accompanying safeguards of judicial scrutiny of evidence and legal representation for the accused) are no longer seen as the appropriate place to deal with minor offences. As we have already seen, legislative proposals increase the maximum fiscal fine to £500 and introduce two other prosecutor imposed penalties – the prosecutor community service order and the prosecutor work order. Most controversially, an opt-out system is proposed, whereby an accused is deemed to have accepted the offer of a fiscal fine or community service order simply by virtue of taking no action within a period of 28 days, although it remains to be seen whether this proposal will survive the scrutiny of the Justice Committee or the Scottish Parliament.

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¹⁴³ McInnes Report, at para 11.34.

¹⁴⁴ Policy Memorandum accompanying the Criminal Proceedings Etc. (Reform) (Scotland) Bill 2006, at para 219.