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The Operation of the Scottish Pilot Public Defence Solicitors' Office

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At the time of the previous ILAC in Vancouver, the Pilot Public Defence Solicitors' Office had been up and running for 8 months and was regarded with considerable hostility by local solicitors. This paper explores some of the changes that have taken place in the last two years.

The Office opened in October 1998 with six full time solicitors. The primary legislation restricted the number of solicitors and included both a five year sunset clause and a requirement that a report be submitted to Parliament within three years of the opening of the Office.

The researchers are due to report in October this year, having collected the last of their data late last year. A major part of the evaluation has involved the tracking of cases handled by both the PDSO and local private solicitors. Thus the scope for varying the operation of the Office was restricted during its first couple of years to avoid prejudicing the research.

The principal focus of opponents of the scheme has been the system of directing clients to the PDSO. This was designed to ensure that as large and unbiased a sample of clients and cases as possible would come to the office during the research period. Any such system would inevitably break into existing lawyer client relationships, which was bound to upset both parties.

The system adopted was based on the client's month of birth and was duly dubbed 'justice by astrology', implying that one would only get justice if one were lucky enough *not* to be born in January or February and therefore be directed to the PDSO. Although we have every confidence that there has been no prejudice to clients in terms of the handling of their cases, it became apparent that some clients were unhappy with the situation. However, as many, if not most, directed clients, came via their existing solicitors, the PDSO may have suffered from poor advance publicity. As a result, the solicitors probably found it harder to gain their clients' confidence.

Nor did the system of direction adequately perform its primary function: the number of clients coming to the Office was lower than expected. There seem to be three main reasons for this.

- Firstly, there was a general decrease in the amount of relevant business in the local courts during this period.

- Secondly, up to a third of all potentially directed clients were granted 'waivers', allowing them to be represented by their solicitor of choice, usually because the case in question was linked to another ongoing case.

- Finally, there is anecdotal evidence that private solicitors continued to act for 'good' clients to ensure that they would return if and when direction was removed and also with any serious, and more profitable cases, which were outwith the remit of the direction system.

We looked at ways of increasing the PDSO's workload, given the shortfall in directed numbers. At the same time as we were making operational changes to increase the Office's workload, the local bar association approached us, asking for direction to be removed and

threatening to challenge the system on human rights grounds. It seemed an apposite time to look more flexibly at ways of feeding the Office.

The Board did not become subject to the human rights provisions of the Scotland Act until October 2000. However, the Scottish Executive became subject in July 1999 when the new Scottish Parliament came into existence. This opened up its decisions to direct challenge under the European Convention of Human Rights. Given that direction had been in force since October 1998 and that everyone knew for months in advance that ECHR was to be incorporated, we had rather thought that the first instance of direction in July 1999 would be challenged. This is certainly what happened with the almost equally controversial system of fixed payments. However, the Edinburgh Bar Association did not approach us until January 2000.

In the end, the Bar Association's challenge did not in fact amount to much. It was really more of a *threat* of challenge, backed up by what turned out to be a pretty weak counsel's opinion. Nevertheless, we took our own opinion and, confident that legally neither we nor the Executive were vulnerable, we decided that we should look at the system of direction afresh.

We were satisfied that, after consulting the researchers, we were not bound to the system of direction for much longer and could in fact remove it as early as July 2000 without posing any significant risk to the research. We could also see several potential advantages of removing the system and, in a strong bargaining position, we were able to negotiate an alternative method of feeding the office to ensure a reasonable throughput of business.

We therefore developed a package of interrelated changes.

- The major change was the complete withdrawal of direction for all new cases from 1 July 2000.

- The alternative we put in place was a hugely increased presence on the local duty solicitor plan.

- Thirdly, the Office would be able to take on solemn cases – which are heard before a jury – either for existing clients or for new duty clients.

- Finally, the number of solicitors was reduced from 6 to 5.

It would not be going too far to say that these four measures have transformed the PDSO's operation. The removal of direction has led to vastly improved relations with local solicitors, with the PDSO solicitors now being invited to join the Bar Association. Although this is largely symbolic, the day to day difference is also immense. From the individual solicitors' point of view, their life is considerably easier, knowing that they are no longer regarded as the enemy. From a business point of view, there are now opportunities for co-operation between PDSO and private solicitors that did not exist before.

The main benefit of this is that the type of reciprocal relationships that most private solicitors develop with colleagues in other firms now exist between the PDSO and private firms. Where one firm is caught short staffed on a particular day, or someone is held up in a trial, a friendly solicitor will often stand in for them in procedural hearings. This effectively allows solicitors to cover a greater number of venues more efficiently. Previously, for the PDSO, there was either a PDS in court or the case could not proceed.

This meant that the PDSO had to maintain cover in every court at all times, which in turn meant that the full compliment of six staff was required from the outset, despite the failure of the workload to meet expectations.

The removal of direction and the consequent improvement in relations with other solicitors has meant that the PDSO can operate on the same basis as other solicitors: this is what has made the reduction of solicitor numbers possible. The Director of the Office has monitored the situation and decided that the reduced solicitor compliment is adequate, at least for the time being.

From a client/solicitor perspective, matters have also improved. The PDSO solicitor is now the first solicitor the client sees, rather than the client being referred along to the Office with a less than glowing recommendation from the solicitor of choice. In an almost intangible way, the PDSO solicitors are feeling the benefit of this change in attitude. There is no research evidence as yet to suggest that client perceptions have improved, although a post direction client satisfaction survey is just about to draw to a close. We look forward to seeing the results.

The way the new system works, the PDSO has an inflated share of the duty solicitor rota at the sheriff and district courts. Previously, the PDSO would have been entitled to around a 5% share of the duty plan, based on the number of solicitors. They now take 60%, a high figure, but one to which the Bar Association appeared fairly happy to agree.

This means that the PDSO deals with a large proportion of custody cases on a daily basis. As duty solicitor, the PDSO represents accused at their first appearance from custody and, if they plead guilty, until the final disposal of their case. If they plead not guilty, accused are free to choose the PDSO or any other solicitor according to preference to represent them throughout their case. It should be noted that accused appearing from custody are free to choose any solicitor at the outset, although only the duty solicitor will be paid for acting for them initially.

It is interesting to note that local cultures appear to have developed, meaning that duty plans operate in different fashions in different courts around the country. In Edinburgh, the practice seems to have been that the duty solicitor would only act where the accused had no existing solicitor, while solicitors of choice would represent clients unpaid. The initial hearing usually amounts to no more than a plea of not guilty and a bail application, but this is work that solicitors were unwilling to entrust to the duty solicitor, apparently for fear that the client would be poached.

Things seem to be slightly different where the PDSO is involved. As duty solicitor, the PDSO ‘puts through’ a pretty large number of clients on behalf of private solicitors, meaning that those solicitors do not have to attend the custody court. There is also an apparent difference in the level of not guilty pleas at these initial hearings. Certainly, the number of clients pleading not guilty and going on to full legal aid is considerably lower than our discussions with the EBA had led us to expect.

Given their regular appearance in the custody court, the PDSO will have more time to consider the cases of the clients it sees, to discuss the cases with the prosecutor and consider, after negotiation with the prosecutor and discussion with the client, whether an early plea would be advantageous. Anecdotally it is suggested that this practice is different to that adopted by most private solicitors.

It is worth noting here also that the difference in payments for pleas of guilty and not guilty is substantial. Although the other factors will also play their part, it is possible that the solicitor's remuneration structure, containing as it does a strong financial incentive to encourage clients to plead not guilty at the outset, might influence duty solicitor behaviour.

This means that the amount of additional work the PDSO takes from its involvement in the duty plan is less than might have been expected: there are now fewer PDSO clients applying for full legal aid than previously. However, and although the low payments to duty solicitors mean that there are few direct cost savings to be made by having the PDSO acting as duty solicitor, the indirect savings of the apparent difference in approach to pleading not guilty at this stage could be substantial.

What we are very keen to stress here is that, as seen in other jurisdictions, the PDSO may see more pleas of guilty at the outset. However, it is also the case that some of the resolutions that are achieved at the initial hearing involve a reduction in the seriousness or number of charges. This is because the PDSO has not only an incentive but also the time to consider the cases more fully at this early stage. The other point that must be made is that a plea of guilty at the outset is not a direct alternative to a spirited defence at trial: a huge proportion of those cases that begin with a plea of not guilty end with a plea of guilty or a mixed plea: we have no reason to believe that PDSO clients have a higher conviction rate overall. The PDSO may simply be bringing forward what is an inevitable plea, perhaps benefiting the client in terms of sentence in so doing and certainly benefiting the tax-payer, both through a reduction of legal aid costs and also the administration of the courts.

The other major change was the move to dealing with solemn – judge and jury - cases. The aim of the PDSO pilot was to compare the provision of summary legal aid, so the PDSO was restricted to this type of work at the outset.

However, while involvement in solemn business might have caused problems for the research, the restriction to summary work caused problems for the Office, especially under a system of direction. A client directed to the PDSO for summary business would then have to use a private solicitor for any solemn work. This was not only confusing and inconvenient for the client, but also meant that the PDSO would have little chance of retaining any *non*-directed clients who had a mixture of solemn and summary work. It also painted the picture of the PDSO lawyers as being somehow less competent or qualified.

Since the relaxation of the rules, there has been a steady trickle of solemn cases coming in to PDSO, partly through duty and partly through the return of existing clients. This has had no significant impact on the ability of the solicitors to carry out their summary duties. However, it has been very important in two respects, firstly in providing a positive motivation for the lawyers within the office, and secondly in significantly improving the perception held by both the public and their peers of the PDSO as "proper lawyers".

The research is due to report in October, and we are of course eagerly awaiting its findings. However, the research is comparing private solicitors with a particular mode of delivery that has now changed substantially. The nature of the Office's business has changed, the number of solicitors has reduced, the number of clients has increased and the overall cost of the Office is about 8% lower in the most recent year than in the one before. In many respects, we expect the research to tell us as much about the implementation of the policy as the relative costs and quality of the two modes of delivery.

So, what lessons have we learned? Firstly, direction is not popular and nor is it particularly effective. The unpopularity of direction has knock-on effects on the operation of the Office, its relationship with other solicitors and the attitudes of its clients.

Direction was required primarily because of the research, itself a requirement of the primary legislation. The second lesson to be learnt is that statutory responsibility to evaluate a project such as this in such a short timescale carries with it its own problems. Pilot projects should be allowed to grow and evolve, so that early lessons can be learnt, problems can be resolved and unforeseen opportunities can be taken. Evaluating an Office so soon after opening means that there is no time to bed in, far less evolve, and that the results will focus on data that is likely to be atypical.

The Office today is not the same as either the Office that was planned or that which opened less than three years ago. Ministers and parliament will have to decide whether the policy should be continued beyond five years, be rolled out or abandoned. If the policy were to be rolled out, it would be important for the changes in the operation of the PDSO over the pilot period to be recognised and for these to be reflected in the nature of any new legislation and indeed any additional offices themselves. Any new policy should be flexible, be able to take account of differences across the country and allow Offices to evolve if necessary, rather than sticking to a rigid plan.

Given the political considerations that led to the creation of the PDSO and the precise nature of the enabling legislation, there was perhaps always bound to be some controversy. However, we feel that, as the project has become established and evolved and, especially, since the most provocative aspect of the pilot has been removed, so the PDSO's standing has changed. Without doubt, we now have a happier PDSO. We also certainly appear to have a far happier local bar. Finally, it appears that, anecdotally, the PDSO has happier clients.

The dissipating controversy also allows a cool look at other options for employing solicitors. The idea of salaried solicitors will shortly be explored in two other contexts. Firstly, on the civil side, the Board is currently assessing proposals from interested advice giving organisations wishing to play host to a solicitor employed by the Board to provide services to the organisation and its clients. Secondly, back on the criminal side, new legislation is currently in train to allow for salaried solicitors to operate as a safety net in cases in which no private solicitor wishes to act under fixed payments.

The motivation for these two ideas is quite different to that for the PDSO and so the operating environment will also be very different. Although only the research can tell us whether the PDSO in action has met its objectives, we already know that it has taught us much about employing salaried solicitors. We are certainly keen to learn more about salaried solicitors in these different contexts.

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